THE CONVEYANCER
AND
PROPERTY LAWYER

VOL. 25, No. 2 MARCH—APRIL, 1961

CONVEYANCER'S NOTEBOOK

ESCROWS

Buckley J.'s decision in *Beesly* v. *Hallwood Estates, Ltd.* [1960] 1 W.L.R. 549, which has been upheld by the Court of Appeal, [1961] 2 W.L.R. 36, has caused considerable perturbation among solicitors. A company sealed a lease and, before exchange, changed its mind. The lessee was held entitled to claim the lease, even if delivered in escrow, for the lessee was at all times willing to comply with the only condition, execution and delivery of the counterpart. As we have asked a contributor to write an article on the subject of escrows (*post*, p. 126) we do not propose to rehash his views here. It is perhaps unnecessary to point out that in the ordinary case of a lease not preceded by any contract actual exchange still appears to be necessary.[1] Nevertheless, the whole practice relating to completions as understood generally in recent years has been undermined. As apparently the point was not taken by the lessee's counsel until after the conclusion of the evidence and some legal argument, it would appear that not only solicitors misapprehended the position. Completion, importing and referring to " the complete conveyance of the estate and final settlement of the business," [2] is no longer the critical point. The decision may have even more far-reaching effects, for the principle underlying escrow is not confined to deeds.[3]

A correspondent suggests that it may be desirable to try to persuade the Law Society to promote an Act making it unnecessary

1 *Eccles* v. *Bryant* [1948] Ch. 93.
2 *Lewis* v. *South Wales Ry.* (1852) 10 Hare 113 at p. 119; *Killner* v. *France* [1946] 2 All E.R. 83.
3 *Wallis* v. *Littell* (1861) 11 C.B.(N.S.) 369; *Pym* v. *Campbell* (1856) 6 E. & B. 370; *Phillips* v. *Butcher* [1945] Ch. 358.

for the appointment of an agent to deliver a deed to be itself under seal. This might make it necessary to alter the form of testimoniums but would not cause any real difficulty. Our contributor has little faith in looking to Parliament for assistance and suggests execution by attorneys, a practice already in force in South Africa and Southern Rhodesia. This simple amendment in the law would undoubtedly settle the practice and be less cumbersome than executions by attorneys.

Law Reform

The *Modern Law Review* for January is a special double number devoted to Law Reform. It would be unkind to say that the *Review* is always playing Don Quixote, for it is under no illusion as to the difficulty of changing the law unless the change has a political flavour. Australia has already found time to legislate to enable the sale of flats to be improved. The plea by Mr. Lewis Cohen, the chairman of the Alliance Building Society, that to facilitate the sales of freehold flats the law should be altered so as to permit the burden of positive covenants to run with the land, is almost certain to be merely a seed that will take many years to grow into a tree forming part of the forest of the law. South Africa finds time for an annual General Law Revision Act which incorporates a miscellany of non-controversial amendments. An ordinary practitioner in South Africa, as we know, can make a suggestion for reform which may alter the law in a matter of months.

Unregistered conveyancing. Professor G. A. Grove in his paper on reform of unregistered conveyancing makes as his principal suggestion for reform the reduction of the forms of settlement to one, the trust for sale. He is almost certainly right in his view that the strict settlement is an anachronism. What is rather surprising is that he is apparently content with the vendor and purchaser summons procedure. It is supposed to be expeditious and cheap: it is neither. In most cases there is no reason why a decision on a summons should not be reached within a matter of days. Most minor points of dispute are resolved simply by one side giving way because he sees no alternative; he cannot wait weeks or months before he can move into the house he has bought, or, as the case may be, before he gets his money which he needs to complete the purchase of another house. This game of chicken is benignly dubbed by Professor Grove "the goodwill of both parties."

Registered conveyancing. Mr. Gerald Dworkin has no broadsides for registered conveyancing. If his suggestion that overriding

interests should appear on the title is to a certain extent impracticable he is probably on safe ground in contending that simplicity is taken too far in the Registry. It is infuriating when a deed describes an easement with precision to find it comes out mangled in the Land Certificate in some such form as: " The land is subject to rights of drainage." The language of a builder, told that his land is subject to rights of drainage but no one knows where the drains are, is inclined to be lurid. How is the solicitor to tell the builder where he may build?

Where we differ strongly from Mr. Dworkin is with regard to his attack on the judicial powers of the Chief Land Registrar. He points out that the Registrar has power to refer matters to the High Court but since 1925 there have only been three references and suggests that there should have been more than this. Very fairly Mr. Dworkin points out the right of appeal from the Registrar's decisions and that there has been none for many years.[4] With all respect, has Mr. Dworkin discovered any case which should have been referred but was not? These hearings are open to the public but in fact apparently few points of principle have arisen. There is no Star Chamber at the Land Registry and the *Conveyancer* has covered decisions in the past and hopes to do so[5] in the future. Even if points of principle arose frequently, what is wrong with the Registrar's jurisdiction? He has not shown himself legalistic in compensation claims and is it really suggested that his knowledge of registered conveyancing law and practice is inferior to that of a High Court judge? For our part, with practical experience of the exercise of jurisdiction, we think it is not one to be curtailed or inhibited in any way. It would be retrograde to introduce the cumbrous and expensive Chancery procedure in lieu of the Registrar's.

Enough has been said to indicate that the January issue of the *Modern Law Review* is worthy of special attention. Perhaps Parliament may be goaded into making some progress even without a Pilgrim.

Finance Act, 1960, s. 38 (1) (*d*)

Subscribers may be interested to learn that the submission advanced by Mr. William Phillips at pp. 1 and 2, *ante*, on the construction of the above section has in one case been accepted by the Commissioners of Inland Revenue.

[4] There is one pending now.

[5] Some time ago Professor Grove suggested that there should be reports of all important decisions and the *Conveyancer* has made arrangements to that end.

HOUSING BILL

There is an unhappy tendency of Parliament to make general amendments to the law of landlord and tenant in bills dealing with special aspects of the subject and the Housing Bill now before Parliament is no exception. Clauses 29 and 30 deal with the obligation to repair houses and in principle have the support of the leading property owners' associations. The sections apply to a tenancy or lease of a dwelling-house for a period not exceeding seven years granted after February 16, but not to a business or agricultural tenancy. If the lease is for seven years or more but is determinable at the option of the lessor not later than the end of the seventh year, it is caught; conversely, a lease with an option to renew which (whether exercised or not) would take it over the seven years is not caught. The county court, with the consent of the parties, may, presumably prior to the granting of the lease, permit contracting out. We imagine this provision is intended to cover the case of a lease of defective premises where the lessee is to put them in repair in consideration of a rent less than the rackrent or where there is a rent-free period or some other *quid pro quo*.

Clause 29 imports a covenant by the lessor to keep the structure, exterior, drains, gutters and external pipes in repair. "Structure," particularly as it is not qualified in any way, is an unhappy phrase and, as the word "exterior" is also used, there seems very little left to the tenant. The lessor is also liable for the repair of water, gas, electricity, sanitation and heating installations (including sanitary fixtures, *e.g.*, wash basins, but excluding other fixtures, fittings and appliances, *e.g.*, gas fires and refrigerators). On general principles, the lessor will not be liable for breach of his obligation unless and until he has notice of the defects.

The lessor is not responsible for defects covered by the lessee's failure to use the premises in a tenantlike manner or by damage done by the lessee. Does this cover damage caused by the lessee's family, guests and licensees? The lessor is also excused from liability for damage caused by fire, but not in the case of damage caused by other perils, such as aircraft.

The lessor has a right to enter on notice for inspection. It may be noted that the statutory liability of landlords under the Housing Act, 1957, s. 6, is not apparently to be repealed.

When the Minister has finished with his tinkering, could he not do something about consolidating the law?

RATING VALUATION

By W. A. Leach, f.r.i.c.s.

Plan of Articles

Article 1

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Article 2

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Article 3

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Certain abbreviations used in these articles have the following meanings:

" the 1925 Act "=the Rating and Valuation Act, 1925;
" the 1948 Act "=the Local Government Act, 1948;
" the 1953 Act "=the Valuation for Rating Act, 1953;
" the 1955 Act "=the Rating and Valuation (Miscellaneous Provisions) Act, 1955;
" the 1959 Act "=the Rating and Valuation Act, 1959;
" the new Bill "=the Rating and Valuation Bill now before Parliament.

ARTICLE 1

I. Preliminary Explanations

Valuation lists

1. Valuation lists are lists for each rating area setting out the rateable hereditaments in the area and the assessments on which they are chargeable to general and certain other rates. Before the 1948 Act came into force the duty of preparing and amending valuation lists fell upon local authorities as " rating authorities " for their areas, but the 1948 Act transferred these duties to " valuation officers " of the Inland Revenue Department, leaving rating authorities only minor duties in regard to the lists, but not taking away their responsibility for collecting the general rate.

2. The first new lists under the 1948 Act came into force, after a number of postponements, in 1956. The next lists should have come into force on April 1, 1961, but they have been postponed until 1963 by the 1959 Act. Thereafter new lists are to come into force on April 1 in each subsequent fifth year.

3. Valuation lists are at present prepared in three sections under the Valuation Lists Rules, 1955.[1] The ratepayer is normally concerned with section I, which contains entries for every hereditament in the rating area to which the list relates. Section II contains entries of alterations made in the list after its coming into force and section III contains totals. Section I is in three parts, Part I setting out every hereditament in the rating area but not including assessments of industrial and freight transport hereditaments,[2] these appear in Parts II and III respectively. Section II is divided into Parts I, II and III for hereditaments other than industrial and freight transport hereditaments, industrial hereditaments, and freight transport hereditaments respectively.

[1] S.I. 1955, No. 1680.
[2] A revision of this arrangement will be necessary for the 1963 lists: see para. 13.

Rateable hereditaments

4. " Hereditament " is defined in section 68 (1) of the 1925 Act as meaning lands, tenements, hereditaments or property which is or may become liable to any rate in respect of which the valuation list is made conclusive by the Act. This does not advance one very far, but for rating purposes the expression means premises which would properly be the subject of a separate rating assessment, *i.e.*, a continuous property in the same and separate occupation and used for a single purpose.[3] If the whole is divided in ownership that is immaterial.[4] What constitutes a " single purpose " would seem to depend on whether the occupier occupies the whole as a whole. A shop and intercommunicating dwelling in one occupation is normally assessed as one hereditament. Premises used indiscriminately for two or more purposes or comprising two or more connected parts used for a common purpose or purposes are also normally assessed as single hereditaments.[5]

5. In *Gilbert* v. *S. Hickinbottom & Sons, Ltd.*[6] it was said that parts of premises in different rating areas are always separately assessed [7] and that if no part is capable of being separately let the premises comprise a separate hereditament.

6. A person entitled to occupy the whole of a single hereditament could not board off a part which could not be separately let and maintain that there were two hereditaments: occupation of part is occupation of the whole [8]; but an occupier cannot be rated in respect of premises he is not entitled to occupy, so that if the landlord boards off a part which cannot be separately let and lets the residue, the part let would be a separate hereditament. An owner who occupies part and has let part is not rateable in respect of the part let [9] and the parts must be assessed separately. Where parts are separately occupied structural severance is not necessary to the parts being separately assessable,[10] but where part of a

3 *North Eastern Ry.* v. *York Union* [1900] 1 Q.B. 733; *Westminster City Council* v. *Southern Ry.* (1936) 24 R. & I.T. 278 (H.L.).

4 *Horner* v. *Gladwin* (1958) 51 R. & I.T. 395 (L.T.).

5 *Heath* v. *Mitcalfe* (1960) 53 R. & I.T. 9 (L.T.); *Thornton* v. *Ormandy* (1959) 52 R. & I.T. 672 (L.T.).

6 (1956) 49 R. & I.T. 231 (C.A.).

7 The provisions of para. 8 of Sched. IV to the new Bill enabling premises divided by a boundary line to be dealt with by one valuation court do not affect the separate assessability in the two areas. Where premises have assessments in two or more areas the aggregate is commonly referred to as the *cumulo* assessment. This, of course, is the amount vital to the ratepayer since it fixes his total liability to rates.

8 *R.* v. *St. Mary-the-less, Durham* (1791) 4 T.R. 477; *R.* v. *Aberystwith* (1808) 10 East 354.

9 *Westminster City Council* v. *Southern Ry.* (1936) 24 R. & I.T. 278; but see note 10.

10 *Allchurch* v. *Hendon Union* [1891] 2 Q.B. 436; but see para. 59, *post*, (Article 2) as to s. 57 of the 1948 Act.

building is occupied by a person entitled to occupy the whole and the parts could be let separately, structural severance may be material.[11]

7. Premises in the same curtilage or contiguous and in one occupation as a whole will normally comprise a single hereditament, but not if the separate parts are so occupied as not to be functionally essential to each other and without intention to occupy the whole or the whole as a whole.[12] Premises separated by a highway will normally be separate hereditaments, the fact that the soil of the highway may be vested in the occupier being immaterial since rating is concerned with occupation and the highway is not occupied.[13] There are, however, cases in which a highway can be regarded as running through rather than between the premises occupied, *e.g.*, a road through a park or golf-course.[14] The question is one of degree and fact for the determination of the Lands Tribunal and the Court of Appeal will not intervene if there is evidence to support the determination of the Tribunal.

8. A rateable hereditament includes the fixtures on the land or buildings which would pass on a letting to a tenant; also such plant and machinery, and only such plant and machinery, as is specified in the Plant and Machinery (Valuation for Rating) Order, 1960.[15] A shed on land which could only be removed by being dismantled has been held to be part of the rateable hereditament [16]; also a sectional garage removable by the tenant of a house.[17]

11 *Westminster City Council* v. *Southern Ry.*, *supra*.

12 *English, Scottish & Australian Bank, Ltd.* v. *Dyer* (1958) 51 R. & I.T. 733 (L.T.); *Murdoch* v. *Lanes (Costumiers), Ltd.* (1959) 52 R. & I.T. 465 (L.T.). *e.g.*, if there is a garage in the curtilage of a house the occupier of the house would normally be inferred to occupy the garage and there would be one hereditament; but if the garage alone were occupied nobody would infer therefrom that the occupier intended to occupy the house and the garage.

13 *Thomson & Sons, Ltd.* v. *Sunderland County Borough A.C.* (1947) 40 R. & I.T. 380 (Q.S.). The premises may be united into a single hereditament by a subway under, or a bridge over, the highway.

14 *Gilbert* v. *S. Hickinbottom & Sons, Ltd.* (1956) 49 R. & I.T. 231 (C.A.).

15 S.I. 1960, No. 122 (made under the 1925 Act, s. 4; applied to London by the Rating and Valuation (Apportionment) Act, 1928). The application of this is not limited to industrial hereditaments, but water, heating, ventilating, lighting and drainage installations are normally taken in with the ordinary rental value of a building and not made the subject of a special addition. Similarly with passenger and goods lifts in non-industrial buildings. See also para. 78 *post* (Article 2). In the case of district heating the central plant and mains would be separately valued as one or more hereditaments but the plant in buildings supplied with heating would be included in the rental value thereof just as in the case of a water, gas, etc., supply. Under the new Bill the Minister will have certain powers of modifying the list of plant and machinery set out in the Order.

16 *London County Council* v. *Wilkins* (1955) 48 R. & I.T. 274 (C.A.).

17 *Holt* v. *Sainsbury* (1960) 53 R. & I.T. 533 (L.T.). As to the exemption of structures for the accommodation of invalid chairs and vehicles constructed or adapted for use by invalids or disabled persons, see para. 53, note 3, *post* (Article 2).

II. Basis of Assessment

Assessment

9. The " assessment " of a hereditament comprises the values ascribed thereto in the valuation list. Some hereditaments have a " gross value," all have a " net annual value," and all have a " rateable value " which may or may not be the same as the net annual value.

Gross value

10. The hereditaments which have a gross value are defined in section 5 (2) of the 1955 Act as those consisting of one or more houses or other non-industrial buildings [1] with or without any garden, yard, court, forecourt or other appurtenances belonging thereto,[2] but without other lands. " House " includes part of a house.[3] " Non-industrial building " means a building or part of a building other than a factory, mill or other premises of a similar character used wholly or mainly for industrial purposes.[4] In relation to a school, college or other educational establishment, " appurtenances " includes all land occupied therewith for the purposes thereof. Amongst hereditaments having a gross value are houses, shops, offices, cinemas and theatres, hotels, petrol filling stations, warehouses, surgeries, etc.

11. The definition of " gross value " is to be found in section 68 (1) of the 1925 Act,[5] *i.e.*, " the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenants' rates and taxes, and the landlord undertook to bear the cost of repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a

1 The reason given for this differentiation was that these classes of hereditaments include many houses, shops and offices let on the basis of the landlord being liable for repairs, whereas in the case of industrial buildings the premises are mainly either owner-occupied or let on repairing leases.

2 1955 Act, s. 3 (5). " Appurtenances " would appear to be qualified by " garden, yard, court," etc., under the rule of *ejusdem generis*. See also *Hollingworth* v. *Clayton* (1960) 53 R. & I.T. 690 (L.T.) (the words " belonging thereto " import a concept of dependency; if the land is not servient to a building it may constitute a separate hereditament).

3 " House " is a wide term (Halsbury's *Laws of England*, 3rd ed., Vol. 32, p. 61), but its present scope is made less important by its being coupled with " other non-industrial buildings."

4 " Industrial " is defined in the Rating and Valuation (Apportionment) Act, 1928, and this definition applies in the Acts of 1925 and 1955: *Crowe* v. *Lloyds British Testing Houses, Ltd.* (1960) 53 R. & I.T. 54 (C.A.). Certain public utility premises are also excepted from the requirement of a gross value.

5 As amended by the Tithe Act, 1936, s. 48, and Sched. IX. Applicable to London under the combined effect of the Acts of 1955 and 1957. (For the purposes of the 1956 valuation lists s. 2 of the 1953 Act set aside this definition as regards private houses, private garages and private storage accommodation, but s. 68 of the 1925 Act will apply to all classes of hereditaments in the 1963 and subsequent lists.)

state to command that rent." [6] There is a proviso that in estimating rental value no account is to be taken of the value of any landlord's services (whether to the tenant alone or in common with other tenants) other than the repair and maintenance of the hereditament. Where the maintenance of the rental value depends on expenditure borne by the landlord on the repair and maintenance of premises not included in the hereditament, such work is in the nature of a service provided by the landlord for the benefit of the tenant and the value thereof, together with the value of other services so provided, is to be excluded from the estimated rental value.[7]

Net annual value

12. Where there is a gross value, the net annual value is the gross value less a deduction according to a scale set out in Schedule II to the 1955 Act.[8] Although not so called, the deduction is historically and logically a deduction for repairs, insurance and other expenses as specified in paragraph 11. Where the hereditament is not one for which a gross value must be determined, the net annual value is the rent at which the hereditament might reasonably be expected to let from year to year if the tenant undertook not only to pay the usual tenants' rates and taxes (as in the definition of " gross value "), but also to bear the cost of repairs and insurance, and the other expenses,[9] if any, necessary

[6] The words " necessary . . . to command that rent " apply only to " other expenses ": *Wexler* v. *Playle* (1960) 53 R. & I.T. 38 (C.A.). See also para. 18.

[7] The statutory deduction referred to in para. 12 expressly applies to expenses affecting the state of the hereditament whereas expenses not affecting the state thereof may also necessarily be incurred if the rental value of the hereditament is to be maintained, *e.g.*, maintaining the common staircase, etc., in a block of flats or offices (paras. 61, 73 *post*, (Article 2)). It is probably necessary to distinguish between capital expenditure on maintaining the capital value of the hereditament, *e.g.*, in erecting a sea wall, and revenue expenditure on a more or less continuous service such as repairing a sea wall, an approach road, a drainage system, or the maintenance and working of a district heating system. See *White Bros.* v. *South Stoneham A.C.* [1915] 1 K.B. 103; *Bell Property Trust, Ltd.* v. *Hampstead A.C.* (1940) 32 R. & I.T. 388 (C.A.), and *Peachey Property Corporation, Ltd.* v. *Whaley* (1960) 53 R. & I.T. 656 (L.T.), which concerned the same hereditament; *Murray* v. *Newbigging* (1952) 45 R. & I.T. 170 (L.T.), which concerned an approach road.

[8] The schedule contains separate scales of deductions for the County of London and areas outside the County of London. The scales may be amended by the Minister by Order (1955 Act, s. 5 (5)), and a new scale is intended to be introduced for application in making the 1963 lists. The provisions of s. 22 (1) (*a*) of the 1925 Act as to the deduction of drainage rates (as amended by s. 5 (7) of the 1955 Act) are to be repealed (new Bill, cl. 6 (2)). Such rates may be expenses necessarily incurred to maintain the premises in a state to command the rent. The wording of cl. 6 (2) may, however, be construed to preclude their deduction from rent to give gross value even if they would otherwise be a proper deduction.

[9] The " other expenses " include a sinking fund to replace buildings and other structures when worn out: see cases cited in Halsbury's *Laws of England*, 3rd ed., Vol. 32, p. 66.

to maintain the hereditament in a state to command that rent. Thus, subject to the correctness of the scale of deductions from gross value, there is an equation of net annual value in all cases. Hereditaments assessed direct to net annual value are buildings such as factories, mills, freight-transport buildings and other buildings which are not " non-industrial " without land, etc., as described in paragraph 10; also such hereditaments as golf-courses, mineral workings, race-courses and sports grounds.

Rateable value

13. The " rateable value " is the value on which the rates payable are calculated. It may be the whole of the net annual value or a fraction thereof. Under the Local Government Act, 1929, agricultural land and buildings [10] were entirely derated (they had hitherto been partially derated) and provision was made for their omission from valuation lists. By the same Act the rateable values of industrial and freight-transport hereditaments were reduced to one-fourth of their net annual values, but the fraction was amended to one-half by the Local Government (England and Wales) Act, 1958. The new Bill proposes to terminate the derating of these hereditaments.

14. Section 1 of the 1957 Act provides for the net annual values of hereditaments for which a gross value is required to be determined (other than dwelling-houses, private garages and private storage accommodation [11]) to be reduced by one-fifth to arrive at rateable value (one-seventh where part only of the hereditament is used as a dwelling-house), but this reduction is expressly applied only to the 1956 valuation lists. In the 1963 lists the rateable values of these hereditaments will be the same as their net annual values.

15. There is provision in clause 2 of the new Bill for the Minister to be able to provide by order for the partial derating of

[10] For definition of " agricultural land " see Rating and Valuation (Apportionment) Act, 1928, s. 2 (2). The definition is lengthy and has been the subject of much litigation. Reference should be made to a textbook such as *Ryde on Rating* if a question arises. An " agricultural building " is a building other than a dwelling-house occupied together with agricultural land or being or forming part of a market garden, and in either case used solely in connection with agricultural operations thereon. This definition is to be read in conjunction with that of " agricultural land." There is also considerable case law. The 1953 Act contained special provisions as to the valuation of agricultural dwelling-houses, but these will not apply to the 1963 lists.

[11] The excepted hereditaments were assessed in the 1956 lists subject to a number of special rules and according to 1939 rental values as against 1956 values for other hereditaments; consequently the 1963 rateable values of the excepted hereditaments are likely to increase proportionately more than for other classes (excluding possibly industrial and freight-transport hereditaments) which will be affected by changes in value since 1956 and the loss of 50 per cent. derating.

dwelling-houses, hereditaments consisting partly of dwelling-houses, private garages and private storage accommodation, so that the increased burden of rates on householders resulting from the 1963 valuation lists, but not any subsequent lists, may be moderated.

III. Rules of Assessment

Rules and practice

16. Before proceeding to analyse the rules to be applied in making a rating valuation a point which seems often to be overlooked must first be emphasised. The purpose of rating valuation is to estimate the annual value of a hereditament and that is primarily a practical matter. The estimate has to be made having regard to rules expressly or impliedly imposed by statute, but every decision of a local valuation court or the Lands Tribunal is not to be looked upon as settling a rule which can be cited in future cases.[1] It may sometimes be valuable to cite the views of the Tribunal on market factors applicable in previous cases, but they should be put forward for comparative purposes, not as rules governing the valuation. Rules can be supported by references to statute or case law, but the market factors to be applied must be established by evidence.

General rules

17. The rent at which a hereditament is worth to be let is:

(a) by definition not a reasonable rent, but what a tenant may reasonably be expected to pay. What a landlord might be able to exact cannot be disregarded since it would affect the mind of the tenant, but the question is what the tenant may be expected to pay and the views of the tenant must predominate (in *Poplar A.C.* v. *Roberts*,[2] what the landlord could exact was restricted by the Rent Acts whereas the tenant might reasonably have been expected to be willing to pay more than the controlled rent, but the principle

[1] *e.g.*, whether a " quantity allowance " (para. 51 *post* (Article 2) should be made in the valuation of a hereditament of very large area is not a matter of rule but of market practice; whether a house adjoining a council estate is worth less than a similar house in the heart of a good residential area is a matter for evidence in the particular case; the fact that the Tribunal has accepted evidence that this has been true in many particular cases does not make it a rule. Also *cf. Autoways (1931), Ltd.* v. *Sheffield City Council* (1957) 50 R. & I.T. 253 (L.T.), and *Hanger Motor Co. (Birmingham), Ltd.* v. *Almond* (1960) 53 R. & I.T. 118 (L.T.) (what rents afford the best evidence of value in a particular case is always a question of fact for the Tribunal and a class of evidence accepted in one case may be rejected in the circumstances of another case involving a similar type of hereditament).

[2] [1922] 2 A.C. 93. See also rule (c), para. 19, note 3, and para. 20, note 17.

would apply equally where there were circumstances enabling the landlord to stand out for an excessive rent [2]).

(b) to be estimated on the assumption that the hereditament is vacant and to let.[3] This raises a number of difficulties. It is sometimes suggested that the assessment should be determined on the assumption that all the comparable hereditaments are vacant and to let so that the whole demand from actual and would-be tenants is spread over the whole of the hereditaments; but that goes too far, *e.g.*, a shopping parade with all the shops let except the one being valued is a different thing from the parade with all its shops vacant and to let. Nevertheless, it would be wrong to treat all the unsatisfied demand as falling upon the one shop being valued for that might give each shop as valued in turn a scarcity value. By rule (d), *infra*, a real value has to be determined and that requires a level of value which can be applied to each shop in turn, recognising that the rental value determined for one shop could lead to a review of the rents under the hypothetical yearly tenancies of all the other shops (see rule (e)). The assessment should be to a scale which could be applied to the rest of the parade.

(c) to have regard to all possible bidders for a tenancy (but see rule (h), *infra*) including the actual occupier. The hypothetical person who secures the tenancy must not be considered to be exceptionally good or bad or to have any especial skill, industry or enterprise. The sitting tenant is to be considered to be an outgoing tenant at the date of the valuation, but to be included in those bidding for a tenancy [4] (presumably a business tenant must be considered not to have followed the statutory procedure for claiming a new tenancy since that would exclude other bidders and lead inevitably to the rent which could be determined under section 34 of the Landlord and Tenant Act, 1954: see para. 20). The rent which a sitting tenant might be willing to pay to remain in occupation is to be considered,[4] but probably only to the extent that it would indicate the most knowledgeable anticipation of the future benefits of occupation and not so far as a higher rent might be offered solely to avoid the cost and loss of removal and disturbance. However, a special desire for a tenancy may be distinguished from the power of a landlord to exploit a tenant and a particular person

[3] *London County Council* v. *Erith Parish and Dartford Union A.C.* [1893] A.C. 562.

[4] *Rank Organisation* v. *Billett* (1958) 51 R. & I.T. 650 (L.T.).

might be considered willing to make an overbid substantially in excess of the general market value.[5]

(d) to be estimated on the real value in the property market resulting from supply and demand [6] (subject to the other rules).

(e) to be estimated on the assumption that the tenancy is one from year to year with a reasonable prospect of renewal.[7] There is a hypothetical tenant, a hypothetical landlord, and a hypothetical world in which no tenant can become an owner or a tenant for a term of years of the premises he occupies.[8] The continuance is to be assumed of the circumstances which constitute the value for the existing mode of occupation unless it can be shown that they are about to undergo a change.[9]

(f) to be estimated in the light of there being no stipulations of the tenancy other than those imported by the definitions of gross and net annual value.[10] This does not prevent regard being had to statutory conditions and restrictions [11]

5 *Hereford Corpn.* v. *Taylor* (1960) 53 R. & I.T. 771 (L.T.); para. 24.

6 *Robinson Bros. (Brewers), Ltd.* v. *Durham County A.C.* [1938] A.C. 321; and note in particular the judgment of Scott L.J. in the Court of Appeal [1937] 2 K.B. 445.

7 *R.* v. *S. Staffs Waterworks* (1885) 16 Q.B.D. 359; but although the hypothetical tenant has this measure of security of tenure, the point of a yearly tenancy is that the rent can be reviewed from year to year in the light of changing circumstances. See, for example, *Brody of East Street* v. *Harding* (1960) 53 R. & I.T. 10 (L.T.) in which it was held that a trader taking premises in an area being redeveloped might be willing to pay a lower rent for a yearly tenancy with a prospect of increases in rent as the area was redeveloped than the rent reserved in the actual lease for a term of years.

8 *Humber, Ltd.* v. *Jones and Rugby R.D.C.* (1960) 53 R. & I.T. 293 (C.A.); see para. 21. The assumption of a yearly tenancy which continues indefinitely precludes regard being had to a notice to quit given to the actual tenant: *Burley* v. *Birch* (1959) 52 R. & I.T. 576 (L.T.).

9 *Consett Iron Co.* v. *County of Durham No. 5 Area A.C.* [1931] A.C. 396; *Lloyd* v. *Rossleigh, Ltd.* (1960) 53 R. & I.T. 217 (L.T.). *E.g.*, in the case of mineral workings the fact that the minerals would be worked out before the end of the year would be a ground for reviewing the assessment for that year. It does not mean that regard may not be had to impending events so far as they might affect the mind of a person bidding for the hypothetical tenancy. Where an area is designated in a development plan for redevelopment within a short period or as subject to compulsory acquisition, the prospect of expulsion might affect the bid of a hypothetical tenant since it affects the assumption of an indefinite continuance of the tenancy. Even a redevelopment under discussion may have that effect: *Lloyd* v. *Rossleigh, Ltd.* (1960) 53 R. & I.T. 217 (L.T.). These are matters for evidence as to the nature of the cause and the probable effect. *Cf.* note 12 (i), *post.* Where a limited period planning permission will expire during the year it is submitted that this should be taken into account together with the prospects of its being renewed.

10 The valuation cannot be affected by the particular terms of the actual tenancy and any special value due to a covenant by the landlord not to let adjacent premises for a competitive business should be disregarded: *Assessor for Renfrewshire* v. *Old Consort Co., Ltd.* (1960) 53 R. & I.T. 792 at 795 and 797.

11 *Liverpool Exchange Newsroom Co.* v. *Pritchard* (1959) 52 R. & I.T. 339 (L.T.); *Morley* v. *Society for Promoting Christian Knowledge* (1960) 53 R. & I.T. 326 (L.T.) (hereditament valued subject to restrictions imposed by scheme

and perhaps, restrictions binding on all persons interested in the hereditament,[11] *e.g.*, covenants for the benefit of other land which could not be set aside by any person interested in the hereditament being assessed.

(g) to be estimated for the particular hereditament as it stands with all its privileges, opportunities and disabilities created or imposed by its natural position and as it is used and occupied when the assessment is made [12] (*i.e.*, *rebus sic stantibus*).

and deed). Planning restrictions must be considered: *Hargreaves* v. *Mechanics Institute* (1959) 52 R. & I.T. 685 (L.T.); but possibly regard may be had to any use for which planning permission could be regarded as certain to be granted if the premises are physically suitable for the use: *Westbury* v. *Wiggins & Co.* (1959) 52 R. & I.T. 469 (L.T.); see also note 12 (ii).

[12] *Robinson Bros.* (*Brewers*), *Ltd.* v. *Durham County A.C.*, *supra.*

(i) The opportunities and disabilities would include foreseeable future trends as affecting the mind of the hypothetical tenant at the time by reference to which the valuation is made: *Aston & Co., Ltd.* v. *Langridge* (1959) 52 R. & I.T. 265 (L.T.). See also note 7, *ante*; also cases cited in *Halsbury's Laws of England*, 3rd ed., Vol. 32, p. 69; *cf.* note 9, *ante*.

(ii) The Lands Tribunal appears to regard "the particular hereditament as it stands" as applying strictly, so that the possibility of even minor alterations which would improve its value must be disregarded (*Hope* v. *Wellcome Foundation* (1960) 53 R. & I.T. 202 (L.T.); *Hargreaves* v. *Mechanics Institute* (1959) 52 R. & I.T. 685 (L.T.)); but the words "as it is used and occupied" seem to be taken more loosely and as applicable to user in a broad sense such as residential, commercial, etc., within the limits of use for purposes of planning control (see also note 11, *ante*). In *Hudson & Son* v. *Rennick* (1959) 52 R. & I.T. 607 (L.T.), the Tribunal said that a hereditament must be regarded as vacant and to let and that the assessment must reflect the reasonable rental bid of any tenant desiring to occupy it for any purpose, not excluding the existing use, which would not necessitate substantial structural alterations. This is wider as to user than words used in other cases and the two cases previously cited would not support the word "substantial" in regard to structural alterations. The Tribunal would appear to be proceeding with a split mind, for in applying user broadly they are taking a practical view of the competition to be faced by the would-be tenant in the market, whereas in applying the existing state of the premises strictly they are making a rule that two things are to be disregarded, (a) the competition from persons to whom the premises would be useful with moderate alterations such as might be undertaken by a yearly tenant with a prospect of indefinite continuation, and (b) the potentiality for the increased value which might arise directly from such alterations, *e.g.*, the removal of a partition between a front shop and a rear store-room, throwing the store-room into the serving space, might cost only £50 but add £100 per annum to the rental value, and even a yearly tenant without the prospect of indefinite continuation would be prepared to pay something for that. However, a private dwelling-house is still assessed as such, although the next-door house has been let without material alteration as a boarding-house or as offices at a much higher rent, and a public-house is still assessed as a public-house, even if it could be used as a shop or offices with no more alteration than is often undertaken by a tenant taking existing shop or office premises, and the rental value as a public-house is only half that as a shop or office. In favour of construing the rule of *rebus sic stantibus* strictly as regards both user and alterations it may be urged (a) that the hypothetical tenancy is a yearly one and any improved value from a change of user or alterations could quickly become the subject of a review of the rent (so far as rating is concerned there could be an immediate proposal for a review of the assessment as if the hypothetical tenancy had come to an end), and (b) it is the actual occupier who has to pay the rates and the proper purpose of the hypothetical tenant is no more

Effect of state of repair

18. In the definition of gross value the landlord is deemed to be responsible for repairs to the hereditament and if it is not in repair at the date by reference to which it is to be valued the landlord must be taken as obliged to put it into repair. A state of disrepair is only a ground for reducing an assessment if it arises from some fundamental and incurable defect in the premises.[13] Apart from

than to avoid limiting consideration to the actual occupier. Against construing the rule strictly is the fact that the hypothetical yearly tenancy is subject to no terms other than those in the statutory definition of gross or net annual value and there is no restriction on user or the carrying out of alterations. The Tribunal's split approach must no doubt now remain until the matter is taken to a higher court.

(iii) The following may be noted amongst the decisions of the Tribunal: Undeveloped land let with a building cannot be valued as available for building an extension, but only for some ancillary purpose such as storage: *Mills Scaffolding Co.* v. *Billings* (1959) 52 R. & I.T. 823 (L.T.). "Space for garage" with a house is not to be considered as a site for a possible garage, but only as a space in which a car might be parked or a coal bunker stood, or as an advantage in putting a house at a distance from its neighbour, or for bringing in coal, manure, etc.: *Williamson* v. *Burkitt* (1957) 50 R. & I.T. 726 (L.T.) (there is also the additional width of garden for the full depth of the plot and in practice a bidder would have to compete with those who saw in the space the possibility of installing a movable garage—if a coal bunker, why not a movable garage?). No addition should be made to an assessment because "garage access" would be possible (it is submitted that in the market that might affect the rental offer): *Woodward* v. *Bulstrode* (1960) 53 R. & I.T. 7 (L.T.). Where in the case of a bakery it was possible to value the hereditament for industrial purposes allowing for the ovens as liabilities, or as a bakery when the ovens would have had a value but the floor space would have been less valuable, the Tribunal considered the common-sense answer was to value as a bakery: *Marchi-Stevenson, Ltd.* v. *Edwards* (1958) 51 R. & I.T. 553 (L.T.), which hardly seems consistent with *Hudson & Son* v. *Rennick, supra.*

(iv) A hereditament cannot be valued for a purpose for which there is no current demand on yearly tenancy, *e.g.*, in *Staley* v. *Castleton Overseers* (1864) 5 B. & S. 505, in which a disused cotton mill from which the process machinery had not been removed was treated as a store for the machinery (during the last war many shops in the London area unlettable as such but let as stores for newspaper print, etc., were assessed for the storage user). But the prospects of letting for the normal user must be very remote and the past is not necessarily evidence of the future, *e.g.*, in *Trustees of Swindlehurst decd.* v. *Robinson* (1959) 52 R. & I.T. 574 (L.T.), premises which were ready to be reopened for use as a shop and café could not be assessed as a store for the chattels therein although they had been unlet for two years (it might also be material that if there was no hope of an early letting chattels could have been more easily removed than heavy cotton machinery).

[13] *Robertson* v. *Scrase* (1953) 46 R. & I.T. 511 (L.T.); *Barley* v. *Sainsbury* (1957) 50 R. & I.T. 401 (L.T.). The principle adopted in this matter by the Lands Tribunal was explained in *Fowler* v. *Lloyd* (1958) 51 R. & I.T. 153 (L.T.). A landlord is assumed to honour his hypothetical obligation to repair to the extent of keeping the hereditament in reasonable condition having regard to its fundamental construction. As regards decorations, a tenant of a newly decorated house does not expect the landlord to keep it at all times in that condition or to reduce the rent each year as the decorations deteriorate. The rent agreed is a compromise figure for the average condition of the premises between newly decorated and as approaching the need for redecoration. Perhaps the approach in *Long* v. *Ward* (1958) 51 R. & I.T. 570 (L.T.) is to be preferred, that as regards decorations regard must be had to the class of occupier who would normally occupy the premises. What is involved is an

work which would not fall within a covenant to repair and maintain, it is not arguable that a hereditament can be let in a bad state of repair at a low rent and that under the definition all that has to be done by the landlord is to repair and maintain the hereditament in a state to command that low rent.[14]

IV. Evidence of Value

Rental evidence

19. Where a property is let at what is plainly a rack rent the amount of the rent is not only the best evidence but the only admissible evidence [1]; but before the rent can be accepted it is first necessary to examine it to see whether it is plainly a rack rent [2] at the material date.[3] Actual rents vary according to the relationship of the parties, their negotiating ability or position, the benevolence or otherwise of the landlord in reletting to a sitting tenant, the times when the rents were fixed and other circumstances. If there are no rents of similar hereditaments with which the rent under consideration can be compared and the tenancy was negotiated recently by parties at arm's length, the actual rent may be preferred to opinion evidence of what the rent ought to be; but even a rent negotiated at arm's length is not necessarily conclusive.[4] Usually, therefore, evidence will be necessary to establish whether or not the rent is plainly a rack rent, " rack rent " for this purpose meaning the full annual value of the hereditament.[5] It is accordingly permissible to adduce evidence of rents of comparable premises to show that a particular rent is greater or less than a rack rent and that it

obligation to repair in a yearly tenancy and what must be considered is the average condition from year to year to be expected in such circumstances. Where there is no gross value see para. 37, note 2, *post* (Article 2).

14 *Wexler* v. *Playle* (1960) 53 R. & I.T. 38 (C.A.). In this case it was held that the words in the definition of " gross value " " necessary to maintain the hereditament in a state to command that rent " do not qualify " the cost of repairs and insurance " but only " the other expenses, if any " so that the rent is to be fixed in relation to the repairing obligation, not the repairing obligation in relation to the rent. (*Mitchell* v. *Cleaver* (1958) 51 R. & I.T. 379 (L.T.), in which the question was said to be whether the landlord would consider it worth while to repair to secure a higher rent or accept a reduced rent with a reduced repairing obligation, would seem to be overruled by *Wexler* v. *Playle*.)

1 *Robinson Bros. (Brewers), Ltd.* v. *Chester-le-Street A.C.* [1937] 2 K.B. 445 (C.A.); *Eastaway* v. *Rees* (1957) 50 R. & I.T. 628 (L.T.); *Gillies & Wright* v. *Barrett* (1958) 51 R. & I.T. 735 (L.T.).

2 *Wexler* v. *Playle*, *supra*.

3 The material date is the date when a valuation for the purposes of a list is made (para. 89 *post* (Article 3)) or the date of a proposal for the amendment of a list (para. 103 *post* (Article 3)).

4 *Ritchie* v. *Gribble* (1959) 52 R. & I.T. 374 (L.T.).

5 *Hudson & Son* v. *Rennick* (1959) 52 R. & I.T. 607 (L.T.); *B. Finch & Co.* v. *Cox* (1959) 52 R. & I.T. 275 (L.T.). An actual rent has regard to the other terms of the tenancy and it may need to be adjusted to show the equivalent gross value, *e.g.*, where the tenant is liable for repairs or the rent is inclusive of occupiers' rates. See paras. 24 and 27.

should be disregarded [6]; or it may be shown that rental values have changed since the tenancy was granted, in which case the evidence may be either of the extent of the change or of the present rental value of the hereditament by comparison with the rents more recently obtained for comparable hereditaments. It has been said [7] that comparable rents given to establish a level of value should be near to the hereditament comprised in the appeal,[8] whereas if the purpose is to establish a principle (or, no doubt, a general trend) the comparables may be drawn from further afield. In either case the comparables should be hereditaments of a similar nature to those under appeal.[9]

What rents are evidence

20. A rent fixed by the court under Part II of the Landlord and Tenant Act, 1954 (which relates to renewals of tenancies of business premises), is not excluded as evidence,[10] but regard should be had to section 34 of the Act as to the basis on which a rent is to be fixed in such a case, *e.g.*, the rental value of tenant's improvements may have been excluded.[11] Council house rents have been rejected on a number of occasions.[12] Where there is a special relationship between the parties the rent will be suspect,[13] and where a property is sold and leased back to the vendor, the lease is part of a capital transaction and the rent will be disregarded.[14] Rents fixed by tender have been rejected, being fixed by a shot in the dark and not by the higgling of the market.[15] A marked disparity between the rents of comparables makes all the rents suspect.[16] High rents due to

[6] *Ritchie* v. *Gribble*, *supra*; *Clover & Clover* v. *Chandler* (1959) 52 R. & I.T. 387 (L.T.).

[7] *William Hill (Hove), Ltd.* v. *Burton* (1958) 51 R. & I.T. 685 (L.T.).

[8] But this may be too narrow: *cf.* para. 33. Of course, in practice, the further afield one goes the more difficult it becomes to establish that the rental levels of the areas are comparable.

[9] See note 7.

[10] *Maidstone & District Motor Services* v. *Richardson* (1960) 53 R. & I.T. 6 (L.T.).

[11] s. 34 also requires to be disregarded any effect on rent of the tenant having carried on business on the premises and any goodwill attached to the holding. This would seem to be consistent with what is required in rating valuation: *cf.* para. 17 (c). In addition, the value of a liquor licence is to be disregarded if the benefit of the licence belongs to the tenant, but in this case it would be necessary in rating valuation to add the value of the licence.

[12] See (1959) 52 R. & I.T. 651.

[13] *Dyer* v. *Mullard* (1958) 51 R. & I.T. 794 (L.T.); *Hughes* v. *Pare* (1958) 51 R. & I.T. 397 (L.T.); *Replacement Engine Components* v. *Toovey* (1958) 51 R. & I.T. 797 (L.T.); *Hudson & Son* v. *Rennick*, *supra*; *Maxwell Investment Co.* v. *Glasgow Assessor* (1956) 49 R. & I.T. 39.

[14] *Trocadero (Swanage), Ltd.* v. *Perrins* (1958) 51 R. & I.T. 140 (L.T.); *Binns* v. *Anderson* (1959) 52 R. & I.T. 322 (L.T.); *Littlewood's Mail Order Stores* v. *Glasgow Assessor* (1953) 46 R. & I.T. 290.

[15] *Rawlinson & Co.* v. *Pritchard* (1959) 52 R. & I.T. 182 (L.T.); *Dyer* v. *Mullard*, *supra*.

[16] *Collings* v. *Langridge* (1959) 52 R. & I.T. 70 (L.T.); *Dyer* v. *Mullard*, *supra*.

scarcity [17] and low rents due to rent control are both to be disregarded.[18] Something between the highest and the lowest of the comparables may be correct.[19] Rents fixed by an authority making grants under the Housing Acts have been rejected.[20] A single rent is scant evidence.[21] Where the valuation officer had not applied rents in determining his assessments of comparables, the inference was that he had rejected the rents as evidence of value and he could not rely on them to support the assessment under appeal.[22] These decisions do not lay down a series of rules but substantiate just one rule, *viz.*, that common sense has to be applied to the particular circumstances.

Rents not related to yearly tenancies

21. Where the actual rent is payable under a lease for a term of years it is not reserved on the basis of the definition of gross value or net annual value,[23] but since the rental value is being considered in a hypothetical world in which every occupier is a yearly tenant with a probability of the indefinite continuation of his tenancy, the Lands Tribunal has, on more than one occasion, expressed the view that in such circumstances a tenant could be expected to offer as much for the hypothetical tenancy as for the actual tenancy. If it is desired to dispute that, evidence in support of a difference between the two rental values must be given, *e.g.*, that the tenant had some special reason for requiring the absolute security of a term of years,[24] that the rent was fixed at a high figure in current circumstances to allow for future inflation, or that the rent was fixed at a high present level to allow for an anticipated future improvement in the value of the pitch.

17 *Kimbells, Ltd.* v. *Payne* (1954) 47 R. & I.T. 255 (L.T.); *Moore* v. *Rees* (1952) 45 R. & I.T. 599 (L.T.). Although ransom rents are to be disregarded a high level of rents from demand exceeding the supply may be a condition of the market which is not to be disregarded: see para. 17 (d).

18 As to controlled rents see para. 17 (a).

19 *Elston* v. *Rance* (1959) 52 R. & I.T. 622 (L.T.).

20 *Titmas* v. *Etwell* (1958) 51 R. & I.T. 801 (L.T.).

21 *Lach* v. *Williamson* (1958) 51 R. & I.T. 92 (L.T.) (but if the rent was arrived at by parties at arm's length there would have to be some good reason for rejecting it: see para. 19).

22 *Jones* v. *Small* (1957) 50 R. & I.T. 725 (L.T.); *Cotswold Electric Co.* v. *Howard* (1958) 51 R. & I.T. 155 (L.T.). It may be more correct to say that the list is also evidence of the valuation officer and that his evidence taken as a whole is, therefore, inconsistent and unreliable. See para. 31.

23 Paras. 11 and 17 (e).

24 *e.g.*, that he intended to lay out a substantial sum in fitting out the premises for his occupation and preferred the certainty of a long term even at a high rent, bearing in mind the power of the landlord to oppose the grant of a new lease under s. 30 (1) (*f*) of the 1954 Act (the landlord may be a person who has taken a concurrent lease or who has acquired the reversion with a view to his own occupation) or s. 30 (1) (*g*) (under which the landlord may require possession for demolition or substantial works of construction).

Weekly and other short tenancies

22. Rents payable under monthly tenancies should be multiplied by twelve to arrive at the annual equivalent, but there is no settled rule or practice applicable to weekly tenancies, where the rents are sometimes multiplied by fifty and sometimes by fifty-two. In favour of fifty it is urged that a tenant binding himself for a year would expect to pay less than when binding himself for a week and that the landlord would be willing to accept a lower amount since he would effect a saving in the cost of rent collection. The latter presupposes that the rent does not remain payable weekly under the longer tenancy,[24a] but in any case the test is what the tenant may be expected to pay and the cost of rent collection does not make the premises any less valuable to the tenant. The County Valuation Committee under the 1925 Act advised a multiplier of fifty-two in the absence of exceptional circumstances.

Inflation

23. Constant inflation since the last war has led to this being an important matter in the minds of those negotiating long leases, so much so that it might nowadays be taken as being always consciously or subconsciously present. The position is sometimes met by reserving a rent rising at intervals of years (a course long followed to allow for the possible increase in the value of the pitch) [25]; or the rent may be made subject to review by agreement or arbitration at specified intervals of years; or it may be fixed at a higher flat rate for the whole term to give the landlord a high present income in compensation for the possibly reduced value of the income in the later years of the term. The general attitude of the Lands Tribunal in regard to inflation has not been very accommodating. The hypothetical tenant is taking his tenancy in a world in which no tenant can have a long lease and, as noted in para. 21, it is for the actual occupier to prove that he is paying more than the hypothetical rental value for his long term. The persons who negotiated the tenancy should give evidence of what they had in mind at the time of the negiotiations and how they allowed for it in the rent; little weight is given to opinion evidence based on general experience of what affects the minds of landlords and tenants bargaining over the terms of a long lease.[26] The prevalence

[24a] Presumably rent under the hypothetical tenancy is payable yearly in arrear!

[25] See, *e.g.*, *Brody of East Street* v. *Harding*, note 8, *ante*.

[26] *Shell-Mex & B.P.* v. *Harding* (1958) 51 R. & I.T. 746 (L.T.); *Phillips Bros. Character Shoes* v. *Childs* (1959) 52 R. & I.T. 557 (L.T.); *Ashton* v. *Langridge* (1959) 52 R. & I.T. 265 (L.T.); *Brody of East Street* v. *Harding* (1960) 53 R. & I.T. 10 (L.T.); but in *Naylors (Reading), Ltd.* v. *Garland* (1958) 51 R. & I.T. 640 (L.T.) evidence was tendered of the actual negotiations and the Tribunal accepted that the rent for the long term exceeded what would have been offered for the hypothetical term.

of progressive rents and rent review clauses in leases is not seen as importing an inference that a rent under a long lease at a flat rate was regarded by the parties as sufficiently high not to warrant these other devices being adopted for protecting the landlord.

Other deviations from hypothetical tenancy

24. An actual tenancy may be subject to full repairing covenants, a premium may have been paid or the tenant may have undertaken to carry out certain works, or the rent may be inclusive of occupiers' rates. In such cases the rent must be adjusted to what it would have been if the lease had been on the statutory terms,[27] whether to convert it into a rack-rent for purposes of fixing the assessment or to reduce it to a common standard for purposes of comparison with other rents.

Repairing leases

25. The value of a tenant's obligation to repair depends to some extent on the length of the tenancy, for unless it is very long, many of the infrequent items of repair, such as repointing, relaying drains, rebuilding chimney stacks, etc., will in practice fall upon the landlord. Assuming, therefore, that the statutory deduction referred to in para. 12 is an accurate allowance for repairs, insurance and other expenses necessary to maintain the hereditament in a state to command the rent, and bearing in mind that, as noticed in note 9 to para. 12, the other expenses include a sinking fund for the replacement of the buildings on the land, the addition to be made to the actual rent for the value of the tenant's repairing obligations should as a rule be substantially less than the amount of the statutory deduction from the gross value equivalent to the actual rent.[27] The common practice is to add 10 per cent. to the rent where the lease is on full repairing terms and 5 per cent. where the tenant is liable only for internal repairs, but some regard should be had to the possible true cost to the tenant of fulfilling his obligations: a true gross value has to be determined irrespective of the correctness or otherwise of the statutory allowance. Although in *Phillips Bros. Character Shoes* v. *Childs* [28] the Lands Tribunal preferred the valuation officer's estimate of £90, which was 10 per cent. of the rent, to the actual cost of repairs as incurred by the tenants for the first few years of their occupation averaged to a yearly amount, it was the answer of £90 and not 10 per cent. which was accepted, the actual expenses over a few years not giving a fair average cost. It was a

[27] It is essential to deduce a gross value first; it is not permissible to deduce a true net annual value and then add the appropriate repairs allowance : *Sandown Park Racecourse Co.* v. *Castle and Esher U.D.C.* (1957) 47 R. & I.T. 351.

[28] (1959) 52 R. & I.T. 557 (L.T.).

practical decision on the facts, not a decision that there is a rule that 10 per cent. is the proper measure to apply to a full repairing lease. Where 10 per cent. is added it is usually taken as including the fire insurance premium.

Premium, improvements, etc.

26. A tenant may have agreed to pay a premium or to carry out improvements or repairs. If a landlord receives a premium of, say, £1,000, he might be able to invest it at 6 per cent. so that the premium would be worth £60 per annum to him. Therefore, he might reduce the rent to be paid by the tenant by £60 per annum, or perhaps a little more since the lower rent will be more secure than the higher one and the tenant will strive not to forfeit the premium he has paid. The tenant, however, might be paying the £1,000 for a term of twenty-one years, so that during the term of the lease he will not only lose the interest on £1,000, but he will also have to put aside a sinking fund to replace his capital when the lease has expired. It may be argued, therefore, that the rental value of a premium to a tenant is his loss of interest thereon plus the sinking fund necessary for its replacement, *e.g.*,

Premium £1,000			
Term of lease 21 years			
Interest on premium at 6 per cent. ... ... =	£60		£60
Annual sinking fund at $2\frac{1}{2}$ per cent. net * for 21 years ... ... =	£23	Annual sinking fund £23 grossed up for tax † ... ... =	£38
Annual equivalent of premium ... ... =	£83		£98

* The interest on the sinking fund will normally be taxable and if 4 per cent. is earned, there will be about $2\frac{1}{2}$ per cent. left to accumulate. The sinking fund figure is taken from tables.

† Leasehold amortisation is not allowed for purposes of taxation and the £23 would have to be found out of taxed income, *i.e.*, to have £23 p.a. for this purpose £38 p.a. must be earned.

As rating valuation is concerned with value to tenant (para. 17 (a)), the annual equivalent of the premium to the tenant is the figure to be added to the rent to equate it to the definition of gross value. The refinement of bringing tax into account is often omitted in rating valuation practice.

27. Where repairs are to be carried out by a tenant at the commencement of his tenancy the expenditure will usually be

equivalent to a premium. Similarly with alterations except, perhaps, in so far as they may have a special value to the tenant, for sometimes alterations carried out by a tenant as a term of the tenancy and more often when carried out voluntarily during the tenancy, improve the premises for his particular purposes without adding a corresponding amount to the value in the letting market. The actual occupier, as a potential bidder for a tenancy, may be prepared to offer more because of the suitability of the altered premises for his purposes, but his offer would be an overbid rather than an additional annual value calculated by reference to the cost of the work.[29] The alterations may, however, have a wider utility, in which case the additional rental value may bear some relationship to the cost of the works, bearing in mind that most alterations are partly destructive even if mainly constructive. Where a lease has been renewed under Part II of the Landlord and Tenant Act, 1954, regard should be had to any improvements carried out by the tenant or a predecessor in title under a previous tenancy and excluded in determining the rent for the new tenancy under section 34 of that Act. The point in issue will be the effect on rental value of the works and not their cost, since it is only the effect on rental

[29] As to an overbid, see para. 17 (c). In *Shell-Mex & B.P.* v. *Harding* (1938) 51 R. & I.T. 748 (L.T.) expenditure incurred by the tenant on alterations was decapitalised precisely over the term of the tenancy. The justification for this may be that one is ascertaining what rent the actual tenant would be prepared to pay for the altered hereditament; but the cost of the work is the same whatever the length of the tenancy so that, contrary to experience, a tenant under a seven-year lease (involving a high sinking fund to replace the expenditure in seven years) would, if the Tribunal was right, be prepared to pay a higher rent than a tenant carrying out similar work under a twenty-one-year lease. Alterations are often undertaken as a business necessity and not for their effect on rental value which, if considered at all by the occupier, would be a secondary matter. A tenant tends to judge alterations on the prospect of increased profits or reduced overheads whereas a premium is a mere payment to the landlord and in a different category in the mind of the tenant. Also the actual tenant is to be considered as an outgoing tenant bidding for a new tenancy (para. 17 (c)) and he would not necessarily be willing to pay an additional rent calculated on the basis of interest and sinking fund on the cost of the work. The question is one of evidence. Some alterations add to the rental value and some do not. A landlord may leave a tenant to carry out such works as putting in partitions as being unlikely to add to the letting value of the premises in proportion to their cost. He may even require reinstatement when the logical development of the Tribunal's method would be to add the present value of the cost of reinstatement to the cost of the work to be decapitalised over the term! A shop front put into premises being let for the first time as a shop may add something to the rental value, but a new front substituted by a fresh occupier to suit his business may add nothing. The front of a shop is the advertising station of the occupier and money spent on a shop front is often regarded more as money spent on advertising. One cannot build up the rental value with each new front installed: if the assessment is to be reviewed one must go back each time to what is the value without a front and how much does the new front add to that.

In *Phillips Bros. Character Shoes* v. *Childs* (1959) 52 R. & I.T. 557 (L.T.) tenant's improvements to the shell of a shop which would add to the value to other possible tenants were taken into account.

value which has to be disregarded in determining the rent under section 34.[30]

Inclusive rents

28. An inclusive rent may be evidence of rental value, but it must first be adjusted to the terms of the definition of gross value or net annual value. A landlord agreeing to pay occupiers' rates under a lease for a term of years would naturally have regard to the possible future burden and allow for the possibility of some increase over the rates payable in the past. He might also allow for the possibility of the assessment being increased and for the expense of dealing with rate demands and assessments. Logically, to arrive at the equivalent gross value the rent should be reduced by the estimated allowance for rates when the rent was negotiated. In *Stepney Borough Council* v. *Moore*,[31] the London Quarter Sessions held that rates should be taken at the rate in the £ likely to be levied in the future rather than in the past, but the length of the tenancy, the opportunities for revising the rent, and the provisions in the lease as to the reimbursement by the tenant of increases in the annual rates are all material. There can be no hard-and-fast rule.

Equated rents

29. Normally a tenant should be taken to have agreed the rent he is to pay under a lease with due regard to possible variations in the future level of rates and assessments, but it would be admissible evidence that the tenant had agreed the rent in the light of the existing liability at the time of the negotiations,[32] *e.g.*, he may have agreed a rent of £200 per annum knowing that his rates would be 20s. in the £ on a rateable value of £100, giving a total liability of £300 per annum. If on a revaluation of the area rates fell to 15s. in the £ on a higher general level of assessment, the rent the tenant might have offered, had he foreseen the new pound rate and

30 See para. 20 and note 11 thereto.

31 (1906) 1 Konst. 14. In *R.* v. *Dodd* (1865) L.R. 1 Q.B. 16, it was held that the deduction for rates should not be reduced by the amount of the landlord's compounding allowance; the question is a practical one: what exclusive rent would the tenant be prepared to pay, and, since a tenant could not have the compounding allowance, he would normally only be willing to pay the inclusive rent less the whole of the rates.

32 *Railway Assessment Authority* v. *Southern Ry.* [1936] A.C. 266; *Olding* v. *Denman* (1951) 44 R. & I.T. 550 (L.T.); *Coombe* v. *Kerridge* (1954) 47 R. & I.T. 462 (L.T.); *King* v. *Lloyd* (1954) 47 R. & I.T. 272 (L.T.); *Kimbell's* v. *Payne* (1954) 47 R. & I.T. 255 (L.T.). In *Glasspool* v. *Buttery* (1957) 50 R. & I.T. 615 (L.T.), the council landlords gave an estimate of rates in a letter to the tenant in negotiations and it was accepted by the Tribunal that the tenant had relied on this in agreeing the rent; *cf. Hartley* v. *Wood* (1958) 51 R. & I.T. 284 (L.T.).

revaluation, would be (assuming net annual value and rateable value to be the same):

Rent assumed to be exclusive and landlord liable for repairs and insurance.

Gross value = G.V.

Repairs allowance for assessment of this magnitude as per scale = £20 + $\frac{1}{6}$ (G.V. − 100) = $\frac{\text{G.V.}}{6}$ + 3

Rateable value = G.V. − $\left(\frac{\text{G.V.}}{6} + 3\right)$.

£300 (rent + rates) = G.V. + $\frac{15}{20}$ (G.V. − $\left(\frac{\text{G.V.}}{6} + 3\right)$).

G.V. (on basis of rent) = £186. R.V. = £152.

30. It will be difficult when the new Bill comes into effect to arrive at the equated rent for a dwelling-house, since until the Ministerial derating orders are made [33] (which will not be until after the new valuation has been completed), it will be impossible to say what the new rate burden will be. The orders will, of course, indirectly affect the rating burden on other classes of hereditaments. Normally, however, a tenant must be taken to have anticipated changes in the levels of the pound rate and assessments. Also, the necessity for industrial derating has long been questioned and the possibility of its repeal should have been foreseen in recent leases (but may not have been fully allowed for). The derating of commercial premises was applicable only to the 1956 lists and its continuation thereafter should not have been anticipated. The need to equate rents should, therefore, only arise in future in very exceptional circumstances.

Evidence of assessments

31. In the *Ladies Hosiery* case [34] the reduction of an assessment was claimed on the ground that it was excessive as compared with the assessments of comparable hereditaments. It was held that if it was a fact that the other assessments were too low and therefore incorrect in the light of the definition of gross value, that was not a ground for making the appealed assessment correspondingly low. Assessments must be made in conformity with section 68 of the 1925 Act [35] and " uniform incorrectness " cannot be claimed. The local valuation court or the Lands Tribunal, however, has to decide on the evidence before it and if the valuation officer does not submit

[33] Para. 15.

[34] *Ladies Hosiery & Underwear, Ltd.* v. *W. Middlesex A.C.* [1932] 2 K.B. 679; 26 R. & I.T. 238.

[35] Para. 11.

that the other assessments are incorrect, these are in the nature of admissions by him [36] to be taken into account with other evidence.[37] Possibly a submission by the valuation officer that other assessments were incorrect would carry little weight without an assertion that they were being reconsidered and that action would be taken to correct them [38]: as noted in para. 20 he could not rely on the rents of other hereditaments to support his case if he had not used that evidence in assessing the other hereditaments.

32. Assessments of other hereditaments determined by "all party agreements" are admissible in evidence in an appeal,[39] when they will be evidence of admissions by the valuation officer, but not by a ratepayer not concerned in the appeal. They have, perhaps, the same value as other assessments in the valuation list which have not been challenged by the ratepayers concerned; they show what ratepayers have been prepared to agree, but they may be stronger where the ratepayer has been professionally advised.

[36] *Pointer* v. *Norwich A.C.* [1922] 2 K.B. 471; but see *Ladies Hosiery* case, *supra*: "It is a vital principle of the law of rating that each hereditament should be independently assessed" (at p. 686) "the position of that hereditament in regard to the test of gross value imposed by the statute is the first question to be considered . . . it is permissible to tender evidence of the assessment of another hereditament said to be comparable . . . *Pointer* v. *Norwich Assessment Committee*. . . . But while such evidence is admissible in chief it is generally of little value" (at p. 687) . . . "it is not of much weight when they have direct uncontradicted evidence" . . . "the assessing authority should not sacrifice correctness to uniformity" (p. 688). See also *Schwehr* v. *Gilbard* (1961) 177 E.G. 101 at 103 ("the Tribunal is primarily concerned, not with the consistency of assessments one with another, but whether upon the evidence the assessment of the hereditament under appeal is correct"). In dealing with proposals in post-war years before 1956 for the amendment of the pre-war lists then current, the Tribunal paid more attention to the tone of the list, applying *Pointer* v. *Norwich A.C.* in preference to the *Ladies Hosiery* case and valuation officers refrained as a rule from giving evidence of later rental values. This had the virtue of doing justice in the circumstances pending completion of the first post-war valuation lists, but in *Harrow B.C.* v. *Betts* (1960) 53 R. & I.T. 577 (L.T.), it was admitted that this was contrary to law.

[37] If the valuation officer does not question the correctness of comparable assessments but gives evidence at variance with these as admissions by him, his evidence may be rejected as inconsistent and worthless; *cf.* para. 20 as to reliance on rents not applied in fixing the assessments of other hereditaments.

[38] In *Fairhurst* v. *Gilmore* (1958) 51 R. & I.T. 316 (L.T.), the valuation officer admitted that other assessments required reconsideration and they were disregarded by the Tribunal. In *Lehain* v. *Gribble* (1960) 53 R. & I.T. 502 (L.T.), costs were awarded against a valuation officer who admitted a mistake in assessments relied on by the ratepayer, but the assessments were disregarded. It is a prima facie assumption that assessments are correct until shown to be incorrect: *Hodges* v. *Howard* (1958) 51 R. & I.T. 623 (L.T.), but it would seem impossible for evidence of their incorrectness to be excluded.

[39] *Stockbridge Mills Co.* v. *Central Land Board* (1954) 47 R. & I.T. 555 (C.A.). This was not a rating case but the principle seems to be applicable.

33. Assessments in one area may be used as evidence in another area, but adequate information should be available for detailed comparisons to be made and the areas should be generally comparable in matters of value.[40]

34. Schedule A assessments are to be disregarded.[41]

[40] *Stockbridge Mills Co.* v. *Central Land Board* (1954) 47 R. & I.T. 555 (C.A.); *Williams* v. *O'Sullivan* (1954) 47 R. & I.T. 308 (L.T.); *Tiverton Borough Council* v. *Rees* (1954) 47 R. & I.T. 291 (L.T.). In this connection it may be noted that all valuation officers and contract valuers to the Inland Revenue Department are agents of the Department: *Shrewsbury Schools* v. *Shrewsbury Boro. Council and Plumpton* (1960) 53 R. & I.T. 476 (L.T.).

[41] *Homan* v. *Marshall* (1959) 52 R. & I.T. 260 (L.T.). Schedule A assessments of let hereditaments are arrived at under different rules; in the case of owner-occupied hereditaments, the assessments of old properties were made in 1936 while those for new properties are made in line with those for the former.

OPTION CLAUSES IN LEASES

By R. E. Poole, ll.m., Solicitor

The law relating to options contained in leases has for many years been in a state of development and of some incoherence; but it is suggested that the decisions of the courts in recent years now make it possible to lay down the following propositions about options for the acquisition at a future time by the lessee of a further interest in the demised premises:

(1) As between the original lessor and lessee, or their personal representatives, an option is enforceable as a contract, and rules applicable to other kinds of interest do not affect it.

(2) As between the original lessor or his personal representatives, and an assignee of the lease, an option is enforceable as if it were a covenant between them, provided that the benefit of the option has been effectively transferred by the original lessee to his assignee. If the option was expressed by the lease to be personal to the original lessee, the benefit of it cannot of course be assigned, but subject to this the benefit of an option for renewal of the lease passes automatically to the assignee, and the benefit of an option to purchase the reversion passes unless it can be shown that the parties intended it not to do so.

(3) As between an assignee of the lessor, and the original lessee, his personal representatives, or an assignee of the lease to whom the benefit of the option has also been effectively assigned, an option to purchase the reversion takes effect, if at all, as a contingent interest in the land, created by a contract, and as such requires registration under the Land Charges Act, 1925, and must comply with the requirements of the perpetuity rule; but an option for renewal is still enforceable as if it were a contract made between the assignees of the lease and the reversion, subject to the anomaly that it needs to have been registered under the Land Charges Act while the reversion was still vested in the original lessor.

(4) Any option which is not simply an option for renewal of the lease (for example, an option for a sublessee to take a longer term if his immediate landlord acquires a larger interest in the premises) is treated in the same way as an option to purchase the reversion.

The application of the ordinary rules of contract to an option

for purchase, as between the original parties, was demonstrated by Jenkins J. (as he then was) in *Hutton* v. *Watling*.[1] This case concerned an option contained in a document which created a weekly tenancy. There was therefore no limit to the time which might elapse before the option was exercised, but Jenkins J. held that the option was "specifically enforceable as a matter of personal contract against the original grantor of the option and that the rule against perpetuities has no relevance to such a case as distinct from a case in which such an option is sought to be enforced against some successor in title of the original grantor, not by virtue of any contractual obligation on the part of the successor in title, but by virtue of the equitable interest in the land conferred on the grantee by the option agreement." On appeal, no attempt seems to have been made to controvert this, as the appeal was based on the contention that the document creating the option was not intended to create a legally binding relationship between the parties. The Court of Appeal rejected this contention, and held the option to be enforceable. It therefore seems that they may be taken to have approved the view of the law taken by Jenkins J.

This view was based on *South Eastern Railway Co.* v. *Associated Portland Cement Manufacturers (1900) Ltd.*,[2] a case which did not in fact relate to an option in a lease, but to a reservation, in a conveyance, of a right to carry out works under the land conveyed. It is of interest to note that at first instance Swinfen Eady J. held that the perpetuity rule did not apply because the provision in question amounted to the immediate reservation of an easement, whereas the Court of Appeal confirmed his decision on the ground that the right was enforceable as a covenant, the benefit of which had been effectively assigned to the party seeking to enforce it.

In following this decision of the Court of Appeal, Jenkins J. rejected the decision of Russell J. in *Rider* v. *Ford* [3] on the ground that counsel in that case, which related to an option to purchase, of which neither the benefit nor the burden had been assigned, did not cite the *South Eastern Railway Co.* case and admitted that the perpetuity rule rendered the option invalid. By implication, Jenkins J. also departed from the decision of Warrington J. in *Worthing Corporation* v. *Heather*,[4] in which it was held that an option which infringed the perpetuity rule could not be specifically enforced but gave rise to an action for damages.

1 [1948] Ch. 26; [1947] 2 All E.R. 641 at p. 645; on appeal [1948] Ch. 398.
2 [1910] 1 Ch. 12.
3 [1923] 1 Ch. 541.
4 [1906] 2 Ch. 532.

In view of the Court of Appeal's evident approval of Jenkins J.'s decision, it is submitted that *Rider* v. *Ford* and *Worthing Corporation* v. *Heather* can no longer be regarded as good law, so far as they conflict with *Hutton* v. *Watling*.

It seems never to have been questioned that an option for renewal of a lease is enforceable as a contract between the original parties and their personal representatives, and that consequently the perpetuity rule is inapplicable and the obligation is enforceable by a decree of specific performance. It was however recently suggested in *Re Strand and Savoy Properties Ltd.*: *D.P. Development Co. Ltd.* v. *Cumbrae Properties Ltd.*[5] that the option needs to be exercisable only within twenty-one years from the date of the lease if it is to satisfy the requirements of section 149 (3) of the Law of Property Act, 1925. The suggestion was rejected by Buckley J.

The effect of an assignment of the lease has mainly been disputed in the case of an option for the purchase of the reversion. Whatever may have been the position at common law, the statute 32 Hen. 8, c. 34, gave the same rights to and against the landlord or tenant for the time being as would have been exercisable between the original parties, and this provision has been carried on by section 11 of the Conveyancing Act, 1881, and by section 142 of the Law of Property Act, 1925. It was, however, laid down by *Spencer's Case* [6] that this was subject to the requirement that the covenant to be enforced must "touch or concern the thing demised," or, in the words of the Law of Property Act, must be "entered into by a lessor with reference to the subject-matter of the lease."

It was long ago established that an option for renewal is a covenant which "touches and concerns" the land and therefore binds or benefits assignees of the original parties to the lease, but in *Muller* v. *Trafford* [7] Farwell J. treated this as an anomaly and refused to extend the principle to any other kind of option. This refusal to extend the principle seems to have been consistent with the practice of the courts in all cases, before or since. It has not meant, however, that other forms of option cannot be assigned at all. In *Friary Holroyd & Healey's Breweries Ltd.* v. *Singleton* [8] an equitable assignee of a lease tried to enforce an option to purchase the reversion. Romer J. held that it was not entitled to

[5] [1960] 3 W.L.R. 1. Buckley J.'s decision in this case was approved and followed by Danckwerts J. in *Weg Motors Ltd.* v. *Hales* [1960] 3 W.L.R. 964.
[6] (1583) 5 Rep. 16a.
[7] [1901] 1 Ch. 54.
[8] [1899] 1 Ch. 86.

do so, because its equitable title did not put it in all respects in the place of the original lessee, and it was incapable of serving an effective notice to exercise the option. He did not suggest that the assignee could not have exercised the option if the assignment had been effective at law as well as in equity, and in fact the Court of Appeal held that the lessor had waived her right to notice and that accordingly the option was validly exercised. They therefore reversed the decision of Romer J. without questioning the correctness of his interpretation of the law.

The matter has been clinched by the Court of Appeal in *Griffith* v. *Pelton*.[9] The judgment of the court was given by Jenkins L.J., and his analysis of the legal position is of great interest. He said: " It is by no means uncommon for leases to contain . . . provisions conferring on the lessee an option to purchase the freehold. But options to purchase land are also not uncommonly granted in cases where the grantor and the grantee of the option do not stand in the relationship of landlord and tenant. Options of the latter class may conveniently be referred to as ' options in gross.'. . . The conditional contract constituted by the grant of the option [in gross] is a chose in action the benefit of which can (if the terms of the contract are such as to show that it is not merely personal to the grantor [10]) be assigned by the grantee to anyone he chooses, subject to any restriction imposed by the contract as to the persons in whose favour assignment is permissible. . . . An option contained in a lease for the lessee to purchase the freehold differs from an option in gross only in the respects that the grantor and the grantee stand in the relationship of landlord and tenant, and that the contract creating it is made part of the terms on which the lease is granted."

Accordingly, the court held that as the lease had defined the word " lessee " as including the lessee's executors, administrators and assigns, an assignment of the lease passed to the assignee the power to exercise the option. As it happened, the original lessee had also executed, some years after the assignment of the lease, a deed expressed to transfer the benefit of the option to the assignee of the lease, and Jenkins L.J. held that this would have effectively assigned the benefit of the option, if the assignment of the lease had not already had this effect. Romer and Sellers L.JJ., the other members of the court, concurred in the judgment.

The rule that the benefit and the burden of an option for renewal automatically affect assignees of the interests in question, by virtue of section 142 of the Law of Property Act, 1925, but

[9] [1958] Ch. 205 at p. 225.
[10] The report reads " grantor," but this should surely be " grantee."

that an option for purchase is not within the scope of this section, makes a much greater difference in cases where the reversion has been assigned, since it makes the burden of the option for renewal pass automatically on to the shoulders of the assignee of the reversion, but not the burden of other options. There is, doubtless, no legal reason why the burden of any other option, in its contractual aspect, should not be deliberately assumed by the assignee, but such a transaction does not seem to have found its way into the reports. In all the reported cases, the principle laid down has been that the option cannot be enforced against an assignee of the reversion as a matter of contract, and that it therefore takes effect against him, if at all, as a contingent interest in the land. As such, it must comply with the requirements of the rule against perpetuities, and it must be registered under the Land Charges Act, 1925.

The need for compliance with the perpetuity rule was shown by *London & South Western Railway Co.* v. *Gomm* [11]; this related to an option for repurchase, contained in a conveyance, so that it was, in Jenkins L.J.'s use of the expression, an "option in gross." As he showed, however, this makes no difference to the principle which operates. The application of the perpetuity rule was stated by Jessel M.R. as follows: "Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal covenant it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant [*i.e.*, a purchaser from the original covenantor] can be bound. . . . But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate." Therefore, he and the other members of the Court of Appeal held that, as the covenant created an executory interest in land, to arise on an event which might occur after the perpetuity period, it was invalid.

Section 10 (1) of the Land Charges Act, 1925, explicitly includes an option to purchase in its definition of a Class C (iv) land charge, so that by section 13 (2) of the same Act such an option is void as against a purchaser of the land in question unless the option has been registered. The need for registration follows logically from what has been said above, for the option, so far as it affects an assignee of the reversion, is an equitable interest; as such, it only affects a purchaser if he has notice of it; and in accordance with the policy of the 1925 legislation this means that

[11] (1882) 20 Ch.D. 562 at p. 580.

it must be registered. The whole matter was well summed up by Jenkins L.J. in his judgment in *Griffith* v. *Pelton*, other passages from which have already been quoted: " Inasmuch as the option creates in favour of the grantee of the option a contingent interest in the land, it may, provided that its exercise is limited to a period permissible under the rule against perpetuities, and provided that the appropriate precautions as to registration are taken, be exercised and enforced against the land in the hands of [a third party acquiring the land]."

Accordingly, in *Wright* v. *Dean*,[12] when a tenant, who had failed to register his option to purchase the reversion, served upon an assignee of the reversion a notice purporting to exercise the option, the notice was, quite rightly, rejected. The tenant thereupon succeeded in a claim for damages against the original lessor, for breach of covenant. The case is of considerable interest, as it illustrates graphically the way in which an option for purchase is to be treated as a contract as against the original lessor, and as a contingent interest in the land as against his assignee. It is also remarkable in showing that there is no duty on the lessee to register his option, as his failure to do so did not preclude his recovering damages from the original lessor; although, as Harman J. remarked in *Hollington Brothers* v. *Rhodes*,[13] there is in section 200 (4) of the Law of Property Act, 1925, a reference to " the obligation to register a land charge in respect of . . . any estate contract."

Although perhaps a surprising decision, *Wright* v. *Dean* seems a just one, since the original lessor doubtless obtained a higher price from the purchaser of the reversion than he would have done if the property had been sold subject to an option to purchase which had been registered and so made enforceable against any owner of the reversion for the time being.

As has already been said, the liability under a covenant for renewal affects a purchaser of the reversion by virtue of section 142 of the Law of Property Act, 1925, and so retains its contractual nature. Consequently, as Farwell J. said in *Muller* v. *Trafford* [14]: " A covenant to renew has been held for at least two centuries to be a covenant running with the land. . . . Perpetuity has no application to covenants which run with the land." Against this, Warrington J., in *Woodall* v. *Clifton*,[15] said of an option to purchase: " I will assume . . . that this covenant being

12 [1948] Ch. 686.
13 [1951] 2 T.L.R. 691 at p. 695.
14 [1901] 1 Ch. 54, at pp. 60, 61.
15 [1905] 2 Ch. 257 at p. 263.

contained in a lease does run with the land as being a covenant touching and concerning the thing demised. Now supposing it does run with the land, I confess that I do not see why that fact takes it out of the mischief that it infringes the rule against perpetuities." His assumption that the covenant might be capable of running with the land (that is, that the obligation might affect a purchaser as a contractual one by virtue of section 142 of the Law of Property Act) was however rejected by the Court of Appeal, and it now seems well established that interests coming within the section, and interests affected by the perpetuity rule, form two mutually exclusive classes.[16]

This view of the matter has been cogently expressed by Danckwerts J. in the recent case of *Weg Motors Ltd.* v. *Hales*,[17] in the following words: "The most important question which arises, in my view, is whether the agreement containing the option was a covenant for the renewal of a lease. If it was not such a covenant, it seems clear that, so far as it amounted to an attempt to create an interest in land, it would be invalid by reason of the rule against perpetuities. . . . But if the agreement is one for the renewal of a lease, the matter is not affected by the rule against perpetuities at all. Covenants for the renewal of leases are said to be an anomalous case which should not be extended. It seems to me to be quite a sensible exception. It appears that covenants for the renewal of leases had become established as valid long before the rule against perpetuities was evolved to prevent unbarrable entails, and they do not seem to me to be involved in the abuses which the rule against perpetuities sought to correct."

It is submitted that, in view of its nature as an incident in the relation of landlord and tenant, a covenant for renewal ought not in principle to require registration under the Land Charges Act, 1925, in order to bind a purchaser of the reversion, any more than any other covenant which would bind him by virtue of section 142 of the Law of Property Act. A tenant should be entitled to assume that any covenant coming within the section will bind his landlord for the time being, simply because he is the landlord, and without any special action on the part of the tenant.

[16] The judgment of the Court of Appeal in *Woodall* v. *Clifton* is capable of being construed as a decision that an option to purchase can never be enforced against a purchaser of the reversion. The matter is discussed in *The Conveyancer* (N.S.), Vol. 18, p. 579, and Vol. 19, pp. 82, 255. It is suggested that the correct view is that of Mr. H. W. R. Wade, at Vol. 19, p. 255; that is, that the Court of Appeal recognised that as the option did not comply with the perpetuity rule, it could only affect a purchaser of the reversion if it was a covenant which "touched and concerned" the land, and that accordingly they were only concerned to establish that it was not such a covenant.

[17] [1960] 3 W.L.R. 964.

The only category in section 10 of the Land Charges Act which is capable of covering an option for renewal is Class C (iv), which defines an estate contract so as to include "any contract by an estate owner . . . to convey or create a legal estate, including a contract conferring . . . a valid option of purchase, a right of pre-emption or any other like right." The examples given in this definition make it seem probable that those who framed it had in mind, as the typical case, an ordinary contract for sale; they would hardly have gone to the trouble of expressly mentioning an option to purchase unless they had thought of it as an exceptional form of the kind of contract which they were describing, and had considered that it required special mention in order to avoid doubts as to its coming within the description at all. This being so, it is unlikely that they intended to include an option for renewal, which has even less in common with a contract for sale of the ordinary kind than an option to purchase has.

Nevertheless, it has recently been held by Buckley J. in *Beesly* v. *Hallwood Estates Ltd.*[18] that an option for renewal falls within the statutory definition, and so requires registration if it is to bind a purchaser of the reversion. He went on to hold that the landlords had in fact created a new lease even though the failure to register the option rendered them not legally bound to do so. The landlords appealed from this latter branch of the decision, without success, but the question of registration did not come before the Court of Appeal. The decision that registration was necessary was no doubt inevitable on a strict interpretation of the words used by the Act, whatever may have been the intention of its framers, but it is submitted that it constitutes an unfortunate anomaly in this branch of the law, especially since its effect is considerably to extend the danger in which landlords stand from the decision in *Wright* v. *Dean*.

Until *Beesly* v. *Hallwood Estates Ltd.*, the question of the need to register an option for renewal seems never to have come directly before the courts. A somewhat similar point had arisen, it is true, in *Sharp* v. *Coates*,[19] a case concerning a sub-tenancy granted by a tenant from year to year, with a provision that if he became owner of the freehold he would grant to the sub-tenant a term of ten years from a stated date. It will be observed that this was not a straightforward covenant for renewal; consequently the court followed the principle laid down by Farwell J. in *Muller* v. *Trafford*, refused to allow the covenant the status of a covenant

[18] [1960] 1 W.L.R. 549; on appeal [1961] 2 W.L.R. 36.
[19] [1949] 1 K.B. 285.

running with the land, and held that in order to bind an assignee of the interest of the grantor of the option it must be registered. The question of perpetuity does not seem to have been raised, but it would appear that the option in this case was also invalid in that it infringed the perpetuity rule.

Sharp v. *Coates* is an instance of a third type of option, not previously discussed in this article, where a sub-lessee is given the right to an extension of his tenancy if his immediate lessor acquires a greater interest himself. The other reported case relating to such an option is *Muller* v. *Trafford*. In this case, A granted a term of eighty years from September 29, 1822, to B, B sub-let to C for sixty-two years from September 29, 1840, less ten days, and C in turn sub-let to D for fifty-two years from September 29, 1850, less twenty days. C covenanted with D that if he obtained an extension of his own term he would grant a corresponding extension of D's term. C died in 1854, and in 1897 the persons entitled under his will assigned his interest to E, subject to the sub-lease to D. E then surrendered his interest to A's successors in title, with a covenant to indemnify him against any claim which might arise in respect of the outstanding ten days of the term granted to B, and was granted a new lease for fifty years from September 29, 1896. D died in 1892, and his executors assigned the residue of his term to F, who now brought proceedings against E for specific performance of the covenant to grant the extended term.

As has already been mentioned, Farwell J. refused to treat this covenant in the same way as a covenant for renewal. Accordingly, he held that the obligation did not pass under 32 Hen. 8, c. 34 (now section 142 of the Law of Property Act, 1925) and was subject to the perpetuity rule. In addition he held that, on its proper construction, the covenant was a personal one by C. He considered that " the draftsman was well advised, and probably intended to limit this to [C] himself, because . . . I think he could not properly have given this option by way of condition precedent to [C], his executors, administrators and assigns, without limiting it so as to avoid infringing the rule against perpetuities."

Taken together, therefore, *Sharp* v. *Coates* and *Muller* v. *Trafford* establish that an option of this kind is subject to the same rules as an option to purchase the reversion, both as regards the need to observe the perpetuity rule and the need for registration. Indeed, it seems probable from the judgments that these rules apply to all options for the grant of a further interest to the lessee, other than options for renewal of the lease.

Something needs to be said in conclusion on the question

whether an option for purchase or for renewal, or indeed any other kind, binds or benefits the parties when the lease containing the option has been renewed, as this question has to some extent become involved with the question whether the option is of a nature to " touch and concern " the demised premises, and cases upon it have therefore been referred to from time to time in connection with the matters discussed above.

It is submitted that in fact this is an entirely unrelated topic, and that it is purely the construction which the court places upon the original lease and on the acts of the parties which decides whether an option, of whatever kind, is to be read into a new lease. The point can, of course, scarcely arise in any case where a properly drawn up new lease has been executed, and consequently all the reported cases relate to instances where there has been some informality. So, in *Re Leeds and Batley Breweries Ltd. and Bradbury's Lease*,[20] and in *Buckland* v. *Papillon*,[21] there was a holding over, on the expiration of a term of years, as a yearly tenant at common law; in the former an option to purchase was held not exercisable by the tenant, in the latter an option for renewal was held exercisable. On the other hand, in *Hill* v. *Hill*,[22] and in *Re Hunter's Lease*,[23] the tenant held over under an agreement for a new lease, though the lease was not formally renewed; in the one, an option to purchase was held exercisable by the tenant, in the other an option to renew the lease, or receive a specified sum as compensation, was held not exercisable. Again, in *Sherwood* v. *Tucker*[24] an option to purchase was held not to have been incorporated in a lease renewed by informal indorsements made without professional assistance, but in *Batchelor* v. *Murphy*[25] a similar option was held to be exercisable where an assignment of the tenancy had been effected by an informal surrender of the old lease and an agreement for the grant of a new one. Each of these decisions seems to rest on its own facts, and it seems impossible to deduce from them any principle as to the nature of options as such.

[20] [1920] 2 Ch. 548.
[21] (1866) L.R. 2 Ch. 67.
[22] [1947] Ch. 231.
[23] [1942] Ch. 124.
[24] [1924] 2 Ch. 440.
[25] [1926] A.C. 63.

ESCROWS

By J. T. Farrand, ll.b., Solicitor

"We'll pluck an escrow together"—Shakespeare, *Comedy of Errors* (Dromio of Eph). Act III, Sc. 1.

The purpose of this article is to re-examine critically the whole topic of delivery of deeds in escrow with particular emphasis on the effect which two recent decisions may have on day-to-day conveyancing practice.

It is believed that, like the writer, many solicitors and their managing clerks, not trusting their memories, tend to rely instead on some form of "reminders" list. Perhaps there are few readers who are not familiar with the excellent "Conveyancing Reminders" published by the Solicitors' Law Stationery Society Limited, in which [1] the following items (*inter alia*) appear for the benefit of a vendor's solicitor immediately before the note of completion itself:

	Date Sent	Date Received
Draft Conveyance, Assignment or Transfer received and returned approved.		
Engrossment of Conveyance, Assignment or Transfer examined and sent to Client for execution.		
Completion Statement prepared and sent to Purchaser's solicitors.		

Assume that these items have been duly ticked in each column, the agreed completion date has dawned, that an appointment for completion itself is fifteen minutes hence, and that the vendor, your client, has just telephoned or called and instructed you not to complete, she has changed her mind, she could not part with her mother's house and will not discuss the matter further. What is the position? It may be asserted with some confidence that no solicitor, much less his more cautious managing clerk, would go ahead and complete against a client's instructions. Instead the appointment to complete will be cancelled with apologies. Thus the question really is: what is the purchaser's solicitor to advise his client to do?

[1] Con. 47.

Damages, specific performance, rescission, we are all more or less familiar with these remedies and with their difficulties and limitations. However, another perhaps more effective remedy is suggested by, and indeed is an unavoidable inference from, two recent decisions on escrows, namely that of Cross J. in *Windsor Refrigerator Co. Ltd.* v. *Branch Nominees Ltd.*[2] (which has since been reversed by the Court of Appeal [3] on an alternative argument not put to Cross J. and not affecting his decision on the escrow point, which indeed the Court of Appeal assumed to be correct) and that of the Court of Appeal in *Beesly* v. *Hallwood Estates, Ltd.*[4] upholding Buckley J.'s decision at first instance.[5] The rather complicated facts and the decisions at first instance in these two cases have been noted respectively at (1960) 24 *Conveyancer*, pages 428 and 328, and on appeal *post*, p. 169, and it is not necessary to the purpose of this article to repeat them.

The basis of the purchaser's " new " remedy is that the vendor has before calling off completion executed and returned to his solicitor the conveyance. The possible permutations, in law and in practice, will be detailed below. For present purposes it can be said that normally, by returning a conveyance signed and sealed to his solicitor, the vendor will have delivered it as an escrow on the obvious and usual condition of payment of the purchase price. Therefore, it may be strongly argued that the purchaser can simply perform this condition on which execution of the conveyance will be completed and the property the subject of the conveyance passed. This contention gains strength from the following words of Cross J. in the *Windsor Refrigerator* case [6]: " The word ' escrow ' is sometimes, I think, loosely used to describe a deed which has not been delivered at all. In fact, however, the two things are entirely different. A deed which has not been delivered at all has no effect whatsoever unless and until the grantor indicates his wish that it shall become binding on him. On the other hand, an escrow—*i.e.*, a deed which is delivered subject to a condition—becomes unconditionally binding, without any further expression of the grantor's will, as soon as the condition is fulfilled." In addition, the present contention appears invincible in view of the decision in the *Beesly* case. In that case, Buckley J. at first instance [7] had found as a fact [8] that a landlord had executed a lease delivering it as a deed

2 [1960] 3 W.L.R. 108; [1960] 2 All E.R. 568.
3 [1961] 1 All E.R. 277.
4 [1961] 2 W.L.R. 36; [1961] 1 All E.R. 90.
5 [1960] 1 W.L.R. 549.
6 At [1960] 3 W.L.R. 1156.
7 [1960] 1 W.L.R. 549.
8 *Ibid.* at p. 563.

conditionally only upon the tenant executing a counterpart and no other condition; the tenant had executed the counterpart and was, and had been at all material times, ready and willing to exchange it for the lease; therefore the learned judge held the landlord to be bound by the lease. The fact of delivery as an escrow was not put in issue on appeal, the plea being that as "there had been no performance of the condition in that the counterpart had not been returned, the [landlord] was entitled to withdraw from what was, in effect, an offer made subject to a condition not then accepted and, therefore, retractable at will by the offeror," *per* Harman L.J.[9] who held [10] that the plea failed: "if you do deliver a document as an escrow it is your act and deed and is not recallable." The learned Lord Justice added that "nobody here on the [landlord's] part called on the [tenant] to deliver her counterpart. There was no unreasonable withholding of it or delay. It was merely that the [landlord], having second thoughts or, perhaps, shrewder advice, determined to get out of what was for them in the event binding. In my judgment, that is exactly what they cannot do." It should perhaps be mentioned that this decision was anticipated by that in *Kidner* v. *Keith*,[11] which was not cited and which is mentioned below on p. 135.

All escape from this argument, and therefore the remedy, appears blocked. It may be suggested that by returning the conveyance signed and sealed to her solicitor the vendor did not deliver it, even as an escrow, but merely put her solicitor in a position to deliver it on her behalf on the due date subject in the meantime to revocation of the authority to do so. This was, it is thought, the common view amongst practitioners before (and perhaps since) the *Beesly* case. It founders, however, on two grounds. First, contrary to the present usual practice, which might well be reconsidered, the appointment of a solicitor as an agent to deliver a deed must itself be *by deed*.[12] Secondly, the view of practitioners is apparently irrelevant. In the *Beesly* case, Buckley J. said [13]: "I do not think that I am at all concerned with what was at the relevant time in the minds of the defendants' solicitors." It may be noted in passing, that this statement contrasts oddly with the learned judge's earlier reference [14] to "contemporary practice" in

[9] [1961] 1 All E.R. 93.
[10] *Ibid.* at p. 94.
[11] (1863) 15 C.B.(N.S.) 35; 143 E.R. 695.
[12] *Powell* v. *London and Provincial Bank* [1893] 2 Ch. 555 (C.A.) (and see *per* Cross J. in the *Windsor Refrigerator* case at [1960] 3 W.L.R. 115), unless it is delivered in the actual presence of the principal when the authority may be given by word of mouth or even by signs: *R.* v. *Longnor* (1883) 4 B. & Ad. 647.
[13] [1960] 1 W.L.R. 549 at p. 562.
[14] *Ibid.* at p. 561.

order to deduce the executing party's intention. However the statement appears to be supported on appeal by Lord Evershed M.R.[15] who rejected the suggestion " that there must first be an exchange, in accordance with ordinary conveyancing practice," although he seemed also to suggest that the relevant intention was to be ascertained objectively.

The inference appears to be that most often on the completion of a conveyance (*i.e.*, when documents and cash pass across a table) there is no delivery—there cannot be in the absence of the client and/or authority by deed. Instead, there is merely the performance of the condition of an escrow. Further, such performance is of necessity beyond the control and prohibition of the vendor.

It is well put by Cross J. in the *Windsor Refrigerator* case [16]: " The question which then arises is whether, if a deed is sealed and handed to an agent of the grantor to deal with in a certain way on the footing that it is not to become binding on the grantor until the instructions are fully complied with, and the instructions are revocable by the grantor so long as they are not yet complied with, the deed can be regarded as having been delivered as an escrow. In other words, can the carrying out of revocable instructions be regarded as conditions of a delivery by the grantor, or should such a deed be regarded as not having been delivered at all by the grantor, with the result that the agent must be authorised by deed to deliver it for the grantor when he has carried out his instructions? " The learned judge ultimately concluded [17] " that a deed cannot be delivered as an escrow at all, subject to an overriding power in the grantor to recall the deed altogether," thereby following the Court of Appeal decision in *Foundling Hospital* (*Governors and Guardians*) v. *Crane*,[18] dealt with below, and his conclusion was, without deciding, assumed to be correct on appeal.[19] Donovan L.J. expresses a like view in the *Beesly* case [20]: " But if I purport to deliver a deed, and at the same time indicate that I am to be free to undo it at any time before it passes to the grantee, I am not delivering a deed subject to a condition, I am not delivering a deed at all; because delivery in this context includes an intention to be bound presently by the deed, albeit in some cases subject to a condition."

The only alternative to the inference suggested above, assuming a finding that the vendor had not delivered the deed at all, even as an escrow, is to say that the vast majority of conveyances today are

15 [1961] 1 All E.R. 90 at p. 95.
16 [1960] 3 W.L.R. 108 at p. 117.
17 *Ibid.* at p. 120.
18 [1911] 2 K.B. 367.
19 [1961] 1 All E.R. 277 at pp. 280, 283.
20 [1961] 1 All E.R. 90 at p. 94.

invalid as not being completed by delivery, though no doubt for practical purposes most would be cured by the presumptions in favour of due executions.[21]

Comparison with Contract

The position and practice as to execution of deeds may be compared with that in contract. " Ever since the case of *Winn* v. *Bull* [22] if not long before, it has been well settled that the result of an offer ' subject to contract ' means that the matter remains in negotiation until a formal contract is executed, that is, if the contract is recorded in two parts until the formal contracts are exchanged. . . . Taught by experience in these courts it is everyday practice for intending purchasers of property who are making an offer to make their offer ' subject to contract ' with the result that they are not at that time bound and have a *locus poenitentiae* until the formal contracts are exchanged ": *per* Maugham L.J. in *George Trollope & Sons* v. *Martyn Bros.*[23] This statement received the approval of the Court of Appeal in *Eccles* v. *Bryant* [24] where it was established that either party in law may resile even after agreement of the terms, engrossment and signature of a formal contract provided exchange has not yet taken place. An illustration of the above position occurred in *King* v. *O'Shee*,[25] where part of Harman J.'s judgment is reported as follows: " The only point between the parties was whether there was a contract. No question arose under section 40 of the Law of Property Act, and the facts were not in dispute. It had been agreed that the documents should be exchanged by post. The critical moment came in this way: By June 1, 1950, each party had signed one part of the contract, its terms having been agreed by their solicitors. Plaintiff's part was posted to defendants who received it on June 2. They later received a telephone message from plaintiff saying he withdrew. Defendant's solicitors had not posted their part of the engrossment to plaintiff's solicitors. For the defence it was contended that the contract to purchase had been concluded on June 1. His Lordship said that there having been no concluded exchange, either party might recall his words." These facts resemble those envisaged at the outset, except that they relate to the completion of the contract rather than the conveyance, yet here it is clear that either party can withdraw. One point remains unclear, on the above facts,

21 See *Re Airey* [1897] 1 Ch. 164, Evidence Act, 1938, s. 4, and L.S.D. Opinion, No. 125.
22 (1877) 7 Ch.D. 29.
23 [1934] 2 K.B. 436.
24 [1948] 1 Ch. 93.
25 (1951) 158 *Estates Gazette* 83.

would the contract be concluded when the second part is posted [26] or when it is received as Harman J. seems to suggest?

However, the cases on contracts by writing under hand were expressly distinguished from facts involving deeds by Cross J. in the *Windsor Refrigerator* case [27] and by Harman L.J. in the *Beesly* case.[28]

Form of Deeds

Having outlined the practical implications of these two recent decisions, it is proposed to detail the law on the execution of deeds in so far as only it may assist with this particular problem. Almost all of the law to be considered has been established by the courts, much of it dating from sixteenth-century decisions, and some of it has become concealed behind the cobwebs of time. This last is the only excuse, with respect, which can be found for certain of the arguments apparently advanced in the *Windsor Refrigerator* and *Beesly* cases, to say nothing of the judgments. The writer may, therefore, be excused for, as it were, revising long-accepted basic principles whilst considering the problem in hand.

The formal requirements of a deed at common law have been long established: " . . . for there are but three things of the essence and substance of a deed, that is to say, writing in paper or parchment, sealing and delivery, and if it hath these, although it wanted, in *cujus rei testimonium sigillum suum apposuit*, yet the deed is sufficient, for the delivery is as necessary to the essence of a deed, as the putting of the seal to it, and yet it need not be contained in the deed that it was delivered." [29] This statement is incomplete in two respects. First, to the three essentials given, Norton [30] would add, clearly correctly, the following words: " whereby an interest, right, or property passes, or an obligation binding on some person is created, or which is in affirmance of some act whereby an interest, right, or property has passed." Second, since 1925, section 73 (1) of the Law of Property Act, 1925, adds: " Where an individual executes a deed he shall either sign or place his mark upon the same and sealing alone shall not be sufficient." Indeed, today, sealing is not only insufficient alone, it is all but an empty formality: " Meticulous persons executing a deed may still place their finger on the wax seal or wafer on the document, but it appears to me that, at the present day, if a party signs a document bearing wax or wafer or other indication of a seal, with the intention of

26 See *Household Fire Insurance Co.* v. *Grant* (1879) 4 Ex.D. 216.
27 [1960] 3 W.L.R. 108 at pp. 118–119; [1960] 2 All E.R. 568.
28 [1961] 1 All E.R. 90 at p. 94.
29 *Goddard's Case* (1584) 2 Co.Rep. 4b at 5a; 76 E.R. 396, 397.
30 *Deeds* (2nd ed., 1928), at p. 3.

executing the document as a deed, that is sufficient adoption or recognition of the seal to amount to due execution as a deed ": *per* Danckwerts J. in *Stromdale & Ball, Ltd.* v. *Burden.*[31]

Delivery

However, we are concerned with the delivery, without which there can be no deed and which chronologically is the last requirement: " the order of making a deed is, first to write it, then to [sign and] seal it, and after to deliver it; and therefore it is not necessary that the [signing,] sealing or delivery be mentioned in the writing, for as much as they are done after." [32] If this order of events is not followed, the deed, to be valid, must be re-executed, it must be signed, sealed and redelivered (which last may be inferred).[33] Therefore, on delivery after signing and sealing the execution is completed and the deed can operate being effective from the time of delivery and not from the date mentioned in the deed,[34] though there is a presumption of delivery on such date.[35] Acceptance of delivery by the grantee is not necessary, the property vesting in the grantee until disclaimer, when it will revest in the grantor.[36]

An unusual illustration of the effect of delivery is the decision of Wood V.-C. in *Hopgood* v. *Ernest* [37] that, where there had been simultaneous delivery of two mortgage deeds, in respect of the same land but in favour of two different mortgagees, so that both deeds took effect at once, the two mortgagees were constituted joint tenants or tenants in common at law. Though his decision was reversed by the Court of Appeal on other grounds, it was assumed, without deciding, that his opinion on the above point was correct. Since 1925, of course, only a joint tenancy at law could be created, a tenancy in common at law not being possible: section 1 (6) of the Law of Property Act, 1925; and as to a joint tenancy at law it may be objected that the circumstances would not be within section 34 (2) of the Law of Property Act, 1925, although the way of escape (via section 36 (4) of the Settled Land Act, 1925) found by the Court of Appeal in *Bull* v. *Bull* [38] might be followed here. Be that as it may, the usual rule is, in the words of Fry L.J. " that

31 [1952] 1 Ch. 223 at p. 230.
32 *Goddard's Case, ante.*
33 *Tupper* v. *Foulks* (1861) 9 C.B.(N.S.) 797.
34 *Hedley* v. *Joans* (1572) 3 Dyer 307a; 73 E.R. 693.
35 *Oshey* v. *Hicks* (1610) Cro.Jac. 263; 79 E.R. 227 (and see an interesting article entitled " Dating a Deed " by P.P. in (1961) 105 *Solicitors' Journal*, 53 and 76).
36 *Mallott* v. *Wilson* [1903] 2 Ch. 494.
37 (1865) 3 De G.J. & Sm. 116; 46 E.R. 581.
38 [1955] 1 Q.B. 234.

when two deeds are executed on the same day, the court must inquire which was in fact executed first, but that if there is anything in the deeds themselves to show an intention that they shall take effect *pari passu* or even that the later deed shall take effect in priority to the earlier, in that case the court will presume that the deeds were executed in such order as to give effect to the manifest intention of the parties." [39]

It may be worth repeating at this point that time may in appropriate circumstances be a substitute for any of the formal requirements of a deed mentioned above. That is to say, due execution may be presumed from long enjoyment.[40] For example, in *Hope* v. *Harman* [41] Lord Denman C.J., with reference to an instrument purporting to be a deed but which had never left the possession of a deceased, held that " its execution by him in the presence of an attesting witness was evidence from which the jury might properly draw the inference that it was delivered." The learned judge added: " Very probably he did not intend or contemplate all the consequences which would flow from its being delivered; but we have no doubt that he meant it to have effect according to its legal operation, whatever that may be." These words, especially when taken in conjunction with the view of Buckley J. in the *Beesly* case that the intentions of a grantor's solicitors are to be disregarded, suggest that it is the duty of a solicitor, when obtaining the execution of a deed by his client, to ensure that the client understands the precise effect of what he is doing. However, these views may be compared with that of Lord Campbell in *Gudgeon* v. *Besset*,[42] namely: " I should attach no weight whatever to what the grantor might think or intend when he delivered the instrument, unless I thought that it was intended *by both parties* that the delivery should operate only as the delivery of an escrow."

Thus delivery, as the final formal requirement tends, both in law and in the usual practice of the get-together completion, to overshadow the other requirements. However, on the one hand, delivery may not always be a requirement at all [43] and, on the other hand, a written instrument is not constituted a deed by delivery alone.[44] Further, delivery is by no means the final formality for a transfer of a legal estate in registered land.

[39] *Gartside* v. *Silkstone Iron Co.* (1882) 21 Ch.D. 762, at pp 767–768. See also *Church of England B.S.* v. *Piskor* [1954] Ch. 535 (C.A.) as to the *scintilla temporis* between purchase and mortgage.
[40] *Wolley* v. *Brownhill* (1824) 13 Price 500; 147 E.R. 1061.
[41] (1847) 16 Q.B. 751n.; 117 E.R. 1069.
[42] (1856) 6 E. & B. 986; 119 E.R. 1131.
[43] See the discussion of delivery by corporations, *infra*.
[44] *Goodright* v. *Gregory* (1773) Lofft 339; 98 E.R. 682.

Registered Land

The forms of disposition of registered land (it is proposed to confine the following remarks to transfers of freehold or leasehold land) require to be signed, sealed and delivered, as any other deed, under the Land Registration Rules, 1925.[45] However, Land Registry transfers are basically different from other deeds assuring property or an interest therein. In the first place, the distinction between an indenture and a deed poll was resurrected by Vaisey J. in *Chelsea and Walham Green B.S.* v. *Armstrong*,[46] where he held that a Land Registry transfer was in the nature of a deed poll rather than a deed *inter partes*, with the result that a non-party could sue upon covenants contained therein.[47] Three points were indicated [48] by Vaisey J. as supporting his opinion: one, there is no reference to parties at the beginning of the transfer; two, it is expressed in the first person; and three, it is of a quasi-public character. The first two of these three points are questions of the usual form; the third leads us to the other basic difference.

In the second place, it must be borne in mind that in registered land conveyancing the legal estate, as a general rule, does not pass to the transferee until his name is entered on the register: sections 19 (1) and 22 (1) of the Land Registration Act, 1925. Thus, though a transfer of registered land is apparently constituted a deed when signed, sealed and delivered, the delivery does not operate to complete the transaction. It follows in the writer's opinion that a transfer of registered land is not normally a conveyance within the meaning of the Law of Property Act, 1925. True *Brickdale and Stewart-Wallace's Land Registration Act*, 1925,[49] at p. 100, states that "it appears" that such a transfer is such a conveyance, but without giving a reason. Also, a like statement is made on p. 137 of *Key & Elphinstone's Precedents in Conveyancing* [50] and the reason given is that by the transfer "an equitable interest is conferred," but normally the equitable interest will have already passed on the contract. The essence of the definition of a conveyance in section 205 (1) (ii) of the Law of Property Act, 1925, is that property, or an interest in property, is thereby assured by one person to another, which is not normally so with a transfer of registered land pending registration. In addition, it is assumed, for example, by sections 19 (3), 38 (1) and (2) of the Land Registration Act, 1925, and rule

45 See Schedule, Form 19.
46 [1951] Ch. 853.
47 *Cf.* Denning L.J. in *Drive Yourself Hire Co.* v. *Strutt* [1954] 1 Q.B. 250, 273.
48 [1951] Ch. 853 at pp. 857–858.
49 4th ed.
50 15th ed., Vol. 3.

76 of the Land Registration Rules, 1925, that a registered disposition is not a conveyance within the meaning of the Law of Property Act, 1925.

How Delivery is Effected

Though the final fact of delivery is an essential formality, the manner in which it may be effected is subject to no rules. Delivery may be effected without the necessity for any words, formal or otherwise, actual physical delivery being sufficient.[51] Also, delivery may be effected by words alone without any physical act.[52]

Further, delivery may simply be an inference from the conduct of the parties.[53] Thus in *Kidner* v. *Keith* [54] where a deed having been executed by the grantee and sent by him to the grantors' solicitor to procure their execution, was signed, sealed and delivered by them, it was held that this was a complete delivery despite an arrangement that the deed was to be executed in duplicate and exchanged (compare the decision in the *Beesly* case). The conduct from which delivery may be inferred may be either at the time of execution or afterwards.[55] Going even further, it is possible to infer delivery from the mere facts of signing and sealing.[56]

But one must not go too far: " This is the argument that has been addressed to us: ' A delivery need not be by physical act; the man who delivers it need not take it into his own hands and say, " I deliver this to you "; he may say when he has signed and sealed the deed, which may be in the next room, " There is my deed which I have signed and sealed: go and take it up " '; and it is said that will amount to a delivery. I do not deny that under such circumstances the act might amount to a delivery; but no case has ever decided that because a man knew that people had been acting on a blank deed as if it were a perfect deed it must therefore be inferred that he knew that the deed was filled up, that he knew how it was filled up, and that he must be taken to have redelivered it. That is carrying the doctrine far beyond any case that can be referred to." [57]

Delivery by a Corporation

It was suggested earlier that delivery by a corporation may be unnecessary. This question was considered (or perhaps decided)

[51] *Anon.* (1573) Ben. & D. 104; 123 E.R. 310; *Thoroughgood's Case* (1612) 9 Co.Rep. 136b; 77 E.R. 925.
[52] *Doe* d. *Garnons* v. *Knight* (1826) 5 B. & C. 671; 108 E.R. 250; *Xenos* v. *Wickham* (1866) L.R. 2 H.L. 296.
[53] *Shelton's Case* (1582) Cro.Eliz. 7; 78 E.R. 274.
[54] (1863) 15 C.B.(N.S.) 35; 143 E.R. 695.
[55] *Keith* v. *Pratt* (1862) 10 W.R. 296.
[56] *Hall* v. *Bainbridge* (1848) 12 Q.B. 699; 116 E.R. 1032.
[57] *Per* Kay L.J. in *Powell* v. *London & Provincial Bank* [1893] 2 Ch. 555, 566.

by Buckley J. at first instance in the *Beesly* case [58] as follows,[59] "The sealing of a deed by a corporate body, in my judgment, prima facie imports delivery of that deed, either unconditionally or conditionally[60]; and I see no reason, in the present case, to conclude that the sealing of the lease by the defendants did not import delivery so as to constitute due execution either unconditionally or in escrow. Indeed, the plaintiff being a 'purchaser' within the meaning of the Law of Property Act, 1925, I think I am bound, by section 74 of that Act, to treat the lease as having been not only sealed, but also delivered." In the Court of Appeal, it was conceded, and therefore not decided, that the learned judge was correct on this point. However, the writer has some doubts as to whether in fact he was correct in also holding, as he did with implicit approval on appeal, that section 74 of the Law of Property Act, 1925, allows the setting up of an execution *in escrow*. After all the section uses the words "deed" and "executed" which do not, one would have thought, contemplate allowing any implication of an escrow, the meaning of which is a "scrowl" or mere writing.

Before 1926, assuming no contractual stipulation on the point, it was necessary for a purchaser to ascertain that the deed of a corporation was regularly executed, that is in accordance with its memorandum, articles of association or charter.[61] In accordance with the general object of the 1925 property legislation of simplifying conveyancing, section 74 removes in favour of a purchaser any necessity for inquiries as to execution. This aspect is no concern of this article; the writer, like a purchaser within section 74, will assume due execution. But unconditional execution will not be assumed, and it would appear from the decision in the *Beesly* case, that a purchaser also may not assume unconditional execution. This appears to be a gloss on section 74 which needs consideration.

In the first place, by deeming a "deed" to be duly "executed," section 74 by-passes in any event the decision in *Feltham* v. *Cudworth* [62] that "no instrument which is not delivered can be a deed. Therefore an instrument which a statute directs to be signed and sealed will not be a deed, unless the Act directs it to be delivered also." But if the decision were not by-passed, the assumption that delivery is an independent essential for a corporation's deed appears doubtful, even as at the date of the decision. Old,

[58] [1960] 1 W.L.R. 549.

[59] *Ibid.* at p. 562.

[60] *Norton on Deeds* (2nd ed., 1928), pp. 12–13; *Mayor, etc., of Merchants of the Staple of England* v. *The Governor and Company of the Bank of England* (1887) 21 Q.B.D. 160, 165.

[61] See *Cope* v. *Thames Haven Dock and Ry.* (1849) 3 Exch. 841.

[62] (1702) 2 Ld.Raym. 760; 92 E.R. 8.

but still valid, authority supports Buckley J.'s judgment that prima facie the affixing of its common seal by a corporation imports delivery.[63] This presumption would, however, be rebutted, for example, if at the same time a power of attorney to deliver the deed were executed.[64]

Going a big step further than the three cases just mentioned, Fry J. stated in *Gartside* v. *Silkstone and Dodworth Coal and Iron Co.*[65] that " a deed executed by a company requires no delivery to make it effectual; *therefore there could be nothing whatever in the nature of delivery as an escrow, and the deed was complete the moment that it received the seal of the company*," and he said this despite the company retaining the debentures in question after they were executed ! If this statement be correct, then the decision in the *Beesly* case must be wrong. However, neither Fry J.'s statement nor, surprisingly enough, the three cases mentioned earlier, can stand with the Court of Appeal decision in *Mowat* v. *Castle Steel and Iron Works Co.*[66] where Cotton L.J. said [67]: " But the debentures must be delivered before they can be binding on the company. The fact of their being dated and sealed does not show that they were delivered." It is thought that the position was perhaps more precisely put by Wills J. in *Mayor, etc.* v. *Bank of England* [68] when he said [69]: " Prima facie, putting the seal on imports delivery; yet, if it be intended otherwise, it is not so; and then, if delivery be made upon a different occasion, and not at a corporate meeting, it must be done by some person acting under a power of attorney from the corporation." Despite this wealth of authority on the point, to the writer's astonishment, it may not be free from doubt. In the *Windsor Refrigerator* case, Cross J. at first instance stated [70] that: " A deed, whether executed by a corporation or by an individual, does not necessarily bind the grantor as soon as it is sealed. It only becomes binding when it has been ' delivered ' by the grantor or his deed, *i.e.*, when the grantor has indicated by words or conduct that he intends the deed which he has executed [*sic*] to be

63 *Willis* v. *Jermin* (1590) Cr.Eliz. 167; 78 E.R. 424; *Anon.* (1674) 1 Vent. 257; 86 E.R. 171.

64 *Ibid.* and see *Derby Canal Co.* v. *Wilmot* (1808) 9 East 360; 103 E.R. 610 where it was held that the affixing of the common seal to a deed of conveyance, otherwise sufficient to pass the legal estate, did not do so because a direction to retain the deed negatived the intent. *Cf.* with these three cases *McDonald* v. *John Twiname, Ltd.* [1953] 2 Q.B. 304 where a company which had acted on a document was treated as having executed it as a deed even in the absence of sealing, never mind delivery.

65 (1882) 29 Ch.D. 762 at p. 768.

66 (1886) 34 Ch.D. 58.

67 *Ibid.* at p. 62.

68 (1887) 21 Q.B.D. 160 (C.A.).

69 *Ibid.* at pp. 165–166.

70 [1960] 3 W.L.R. 108 at p. 115.

binding on him." In fact, Cross J. held that there had been delivery neither as an escrow (implying it to be possible) nor at all. As already stated, on this aspect, Cross J. was, on appeal, assumed to be correct, Harman L.J. going so far as to say [71] that the learned judge's statement of the law seemed to be consonant with the Court of Appeal decision in the *Beesly* case. Although Harman L.J. was a member of the court also in the latter case, so far as the necessity for delivery by a corporation is concerned, there is certainly a conflict.

However, disregarding the dicta in the *Windsor Refrigerator* case as imprecise, the conclusion appears to be that even before 1926 and now by virtue of section 74 of the Law of Property Act, 1925, due sealing was and is the only essential of execution of a deed by a corporation. However, before 1926 it seems clear both that sealing did not necessarily import delivery if that was not the intent, and that delivery could be effected later either at a corporate meeting or by an attorney. On the other hand, since 1925, under section 74, in favour of a purchaser [72] a deed having a seal affixed in accordance with the section is to be deemed to have been duly executed by a corporation. It appears to follow that this will be so even if the corporation intended no delivery at all, since the object is to protect purchasers. Again, before 1926, since the corporation's intent was looked to, execution in escrow was logically possible and it was so held by the Court of Appeal in *Lloyds Bank Ltd.* v. *Bullock*.[73] On the other hand, since 1925, *logically* so far only as a purchaser is concerned it might have been thought that by virtue of section 74 no execution in escrow is possible. The contrary was held in the *Beesly* case and a possible explanation might have been (this point was not considered in the case) that there the purchaser was not in good faith (as required by section 205 (1) (xxi)) since she must be and was taken to have known that execution in escrow was intended. But this was clearly not the explanation; Buckley J. expressly treated the tenant as a purchaser within the meaning of the Law of Property Act, 1925. From this it follows that all purchasers should ascertain whether or not a corporate deed was executed in escrow, that is, what the intention of the corporation was when the seal was affixed. That this is so appears beyond argument. Buckley J. himself divided the question into two parts [74] (a) execution? and (b) unconditionally or as an escrow? adding "that the latter question depends upon the executing party,

71 [1961] 1 All E.R. 277 at p. 283.
72 As defined in s. 205 (1) (xxi)—otherwise the pre-1926 law applies.
73 [1896] 2 Ch. 192.
74 [1960] 1 W.L.R. 549 at p. 561.

and is a question of fact to be determined upon *the whole evidence of the circumstances attending the execution.*" These last words might well cause cold shudders, particularly so when it is appreciated that Buckley J. held, as did the Court of Appeal, that the minute of the meeting at which the corporate seal was affixed was not conclusive whether or not the execution was intended to be in escrow. On the facts of that case it suited the tenant-purchaser well enough that the execution should be in escrow as she had performed the condition. But what of other purchasers? What inquiries as to a corporation's intent are they to make? On what authority would they be safe in assuming that the apparently usual and natural condition, *e.g.*, payment of purchase-money or execution of a counterpart, is that intended by the corporation for performance?

Further, a minor inconsistency in the *Beesly* case decision, at first instance and on appeal, was the holding that the minutes of the meeting at which the seal was affixed, though not conclusive that no escrow was intended, were conclusive that delivery at all was intended. If this is right, a purchaser need only see the minutes as to this aspect. But is it right? The distinction between intention as to an escrow and as to delivery at all is illogical. However, it is submitted that this latter view is more nearly right than that the minutes may be disregarded. Surely the only correct view is that for evidence of the corporation's intention, both as to delivery at all and as to execution in escrow, it is sufficient to look at the minutes of the meeting, if they purport to be signed by the chairman of that or the next meeting, which are to be taken as prima facie correct.[75]

Delivery Through Third Party

Delivery may be effected through a third party, who in the cases most often turns out to be the grantor's solicitor. The rule is that the effect of the grantor handing a deed which has been signed and sealed to his solicitor entirely depends on the grantor's intention.

First, there may be no delivery at all. Secondly, there may be an effective and complete delivery of the deed without anything

[75] S. 145 (2) of the Companies Act, 1948; *Re Indian Zoedean* (1884) 26 Ch.D. 70. The minutes are not, of course, conclusive evidence (*Roney's Case* (1864) 4 De G.J. & Sm. 426), nor are they the only admissible evidence (*Re Dyle Works (No. 2)* [1891] 1 Ch. 173, 184), but a purchaser will be absolved from further inquiry. Even so, this is an inroad not only into the deeming protection of s. 74, but also into the general law presumption of validity. It has been held that persons dealing with a company have a right to assume that an instrument which is on the face of it regular has had the seal duly affixed, and that the directors were duly appointed and their signatures duly made: *Re County Life Assurance Co.* (1870) L.R. 5 Ch.App. 288; *Mahony* v. *East Halford Mining Co.* (1875) L.R. 7 H.L. 869; *cf. Royal British Bank* v. *Turquand* (1856) 6 El. & Bl. 327.

more.[76] The grantee can then enforce the deed, despite the fact of the grantor's solicitor having attempted to hand the deed on to him and his having refused to accept it,[77] though this will not be so in the case of a disclaimer.[78] Thirdly, the grantor may intend his solicitor to deliver the deed for him. If so, the rule is clear: "It is quite true that you may deliver a deed on a condition, and that when the condition is performed, the performance of the condition effectuates the delivery; but that is by virtue of the original intention and act of the grantor. . . . It is well known law that an agent cannot execute a deed, or any part of the execution which makes it a deed, unless he is appointed under seal," [79] and "There are certain things in the law which are well settled, and whether you like it or not, and one is that an authority to an attorney to deliver a deed on behalf of another can only be conferred by an instrument under seal duly executed by the principal." [80]

Delivery as an Escrow

Fourthly, the grantor may intend the deed to take effect conditionally only: "It is the ordinary and almost invariable practice for the vendor to execute the conveyance and give it to his solicitor, who exchanges the deed for the purchase-money when paid by the purchaser. But it would be a monstrous thing for the purchaser to be allowed to say to the seller 'You have executed the deed, and therefore I need not pay the purchase-money; and I have got the legal estate, and you must enforce payment of the purchase-money as you can.' On the contrary, I am of the opinion the purchaser has no estate until he has the deed. This I take to be the ordinary case which occurs every day, where the deed of conveyance is executed as an escrow." [81]

This statement of ordinary practice still obtaining today is rendered not strictly accurate in law by the words "until he has the deed." The legal estate may pass independently of the physical whereabouts of the conveyance. "The efficacy of a deed depends on its being sealed and delivered by the maker of it; not on his ceasing to retain possession of it. This, as a general proposition of law, cannot be controverted. It is not affected by the circumstance that the maker may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until

[76] *Grugeon* v. *Gerrard* (1840) 4 Y. & C.Ex. 119; 160 E.R. 945; *Macado* v. *Stroud* [1922] 2 A.C. 330.
[77] *Taw* v. *Bury* (1558) 2 Dyer 167a; 73 E.R. 366.
[78] *Mallot* v. *Wilson* [1903] 2 Ch. 494.
[79] *Per* Bowen L.J. in *Powell* v. *London and Provincial Bank*, *ante*, at p. 563.
[80] *Per* Joyce J. in *Re Seymour* [1913] 1 Ch. 475, 481.
[81] *Per* Romilly M.R. in *Walker* v. *The Ware, etc., Ry.* (1865) 35 Beav. 52; 55 E.R. 813.

a certain time has arrived, or till some condition has been performed, but when the time has arrived, or the condition has been performed, the delivery becomes absolute, and the maker of the deed is absolutely bound by it, whether he has parted with possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed. It is a mere escrow." [82] Thus, in the case instanced by Romilly M.R.[81] as ordinary the estate would pass to the purchaser when he paid the purchase price, even though he did not receive the conveyance. But possession of the conveyance is not quite irrelevant; the fact that the purchaser has obtained, and the vendor's solicitor parted with, possession would be prima facie evidence that the condition on which the deed was delivered as an escrow had been performed.[83]

However, all that is conditional is not an escrow. In the leading case of *Foundling Hospital (Governors and Guardians)* v. *Crane* [84] a deceased had signed and sealed a document, which purported to be an assignment by him of certain premises to a Mrs. Brown, and he had handed it, undated, to his solicitors with the intended effect set out in a letter written by the solicitors on the same day as follows: "We acknowledge that you have today executed the assignment of your lease to Mrs. Brown as an escrow, and that we are to retain it on your behalf until you send us instructions to complete the deed. In the event of your dying before the deed is completed, we understand that we are to consider the deed as having been completed before your death, and to take what steps are necessary to vest the lease in Mrs. Brown, should she wish it." The document was also signed and sealed by Mrs. Brown, but it was inferred by the Court of Appeal that she understood the intended effect as above stated. The deceased occupied, paid the rent, rates and taxes, and retained the title deeds of the house until he died without giving further instructions to his solicitors. The execution of the document did not satisfy the requirements of section 9 of the Wills Act, 1837. The Court of Appeal unanimously held that the document was inoperative, Farwell L.J. saying[85]: "It is essential to the validity of the deed that it shall have been delivered. There are two sorts of delivery, and two only, known to the law, one absolute, and the other conditional, that is an escrow to be the deed of the party when, and if, certain conditions are performed. If the deed operated as a complete delivery, *cadit quaestio*; if it did not, then it must be either an escrow or a nullity.

82 *Per* Lord Cranworth, *Xenos* v. *Wickham* (1866) L.R. 2 H.L. 296 at p. 323.
83 *Hare* v. *Horton* (1833) 5 B. & Ad. 715; 110 E.R. 954.
84 [1911] 2 K.B. 367.
85 *Ibid.* at p. 377.

The mode in which it in fact operated is a question of intention, primarily of the grantor, and secondarily of the grantee; nothing passes out of the grantor against his intention, and no one can be compelled to accept any property, onerous or otherwise, without his consent." After holding that there was no absolute delivery, Farwell L.J. continued,[86] "Was the deed then delivered as an escrow, or was there no delivery at all? I doubt if a man, by executing a deed, and handing it over to his own solicitor to be held on his behalf until he gives them further instructions, makes a delivery of it as an escrow at all; I doubt also if a deed can be delivered as an escrow at all subject to an overriding power in the grantor to recall the deed altogether; but [the deceased] gave no such instructions; and I will deal with the contention that the condition was the death of [the deceased]. I am of opinion that this is not a good condition for an escrow; a deed of grant of the grantor's own property to take effect only on the death of the grantor is necessarily testamentary, and cannot be turned into a deed." A similar decision had been reached in *Doe* d. *Lloyd* v. *Bennet*,[87] where it had also been pointed out that a condition cannot unilaterally be imposed by the grantor after delivery, and as mentioned above the decision in the *Foundling Hospital* case was followed by Cross J., with the approval of the Court of Appeal, in the *Windsor Refrigerator* case.

Conditional on Execution by Another Party

Frequently in practice a grantor executes a deed in the expectation that it (or a duplicate or counterpart) will be executed also by some other person. Thus in *Luke* v. *South Kensington Hotel Company* [88] it was stated by Jessel M.R.[89] that "it is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute." But this statement was criticised unanimously by the House of Lords in *Lady Naas* v. *Westminster Bank, Ltd.*[90] as being *obiter*, based on no authority, and too wide. Viscount Maugham suggested [91] that the statement would reflect the law if the words "and that is known to the other parties to the deed" were deleted and the words "and with the intention that the two persons will not otherwise be bound" substituted. The result of this amendment, and indeed

86 *Ibid.* at p. 379.
87 (1877) 8 C. & P. 124 N.P.
88 (1879) 11 Ch.D. 121.
89 *Ibid.* at p. 125.
90 [1940] A.C. 366.
91 *Ibid.* at p. 376.

of the decision of the House of Lords, is that in the absence of delivery by the grantor as an escrow proper (*i.e.*, unless the execution is found as a fact to be conditional on execution by the other person) a deed will operate immediately to vest the beneficial interest in the grantee which interest can only then be divested by disclaimer.

As a postscript to the last two cases mentioned, it is to be noted that Lord Cozens-Hardy M.R. observed in *Elliston* v. *Reacher* [92] that, " It is laid down in Co.Litt. 230b, that a man who takes the benefit of a deed is bound by a condition contained in it, though he does not execute it." [93]

To Whom Is Delivery as an Escrow to be Made?

It was held in many cases, which cannot now be regarded as authoritative, that a deed could not be physically delivered to the grantee himself as an escrow. But it is clear from the Court of Appeal decision in *London Freehold and Leasehold Property Company* v. *Suffield (Baron)* [94] that a deed may be delivered as an escrow notwithstanding that it is handed to a person who is a party taking under it. That the mere handing to the grantee's solicitor of a document executed by the grantor does *not* necessarily convert the document from an escrow into a deed had already been decided in *Watkins* v. *Nash*.[95] Also it had been decided even earlier that delivery of a document to an attorney acting for all the parties, with instructions that the document is only to take effect when something else is done, in fact operates merely as an escrow.[96]

A case more relevant to the topic of this article is *Coupe* v. *Collyer*.[97] There both the transferor and the transferee of a mortgage had employed the same firm of solicitors. In October 1888 the transferor executed the transfer, which expressed that the money consideration was paid, and handed the transfer together with the title-deeds to the solicitors, taking from them a receipt which contained an undertaking to return them or to pay the principal and interest due. (I pause here to mention that this is surely in practice the normal understanding of a client who signs

92 [1908] 2 Ch. 665 at p. 669.

93 See also the Court of Appeal decision in *McDonald* v. *John Twiname, Ltd.* [1953] 2 Q.B. 304 where a company which had taken the benefit of covenants was treated as having executed an agreement as a deed even though in fact it had not done so. It is not within the scope of this article to discuss further the exceptions, at common law, in equity, or by statute, to the doctrine of privity of contract.

94 [1892] 2 Ch. 608.

95 (1875) L.R. 20 Eq. 262.

96 *Millership* v. *Brockes* (1860) 5 H. & N. 787.

97 (1890) 62 L.T. 927.

a conveyance, adopts the seal on it, and then returns it to his solicitors.) In February 1889 the solicitors handed the transfer and the title-deeds to the transferee, and in March 1889 the solicitors filed their petition in bankruptcy. The transferee had not paid the money in cash to the solicitor but had set off in his books part of the sum owed to him by the solicitors. The transferor brought the action against the transferee for payment of the money consideration or for return of the transfer and title-deeds. Kay J. held, *inter alia*, that the transfer was an escrow until the transferee had paid the money to the solicitors in cash.

Proof of Delivery as an Escrow

It has long been established that it is a question of fact depending upon all the circumstances of the transaction whether a document has been delivered as a deed to take effect from the moment of delivery or as an escrow not to operate until a certain condition is performed.[98] It is equally clear that no formal act or express form of words is necessary to constitute an escrow which may be inferred from the circumstances of execution,[99] and that the mere signing, sealing and using words of delivery, which are absolute in form, is not conclusive evidence of the legal delivery of a deed.[1] However, where a document is found to be prima facie properly executed as a deed and in proper custody, then the onus of proving that the document was delivered as an escrow only is on the party so asserting.[2]

Two interesting points were decided by the Court of Appeal in *Thompson* v. *McCullough*.[3] First, the plaintiff, contending that a certain conveyance was not delivered only as an escrow, produced the conveyance which contained the following time-worn formulae "signed, sealed and delivered by the said J.T.K.," and "this conveyance is made on the 10th day of April, 1946," and "in witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first before written." Against all this there was uncontradicted evidence that on April 10, 1946, only £34 had been paid out of the purchase price of £110. There was no other relevant evidence and the Court of Appeal held it to be the natural inference from the latter evidence that the conveyance was delivered on April 10 as an escrow. Secondly, the plaintiff then contended that when the balance of the purchase price was

98 *Murray* v. *Stair* (*Earl*) (1823) 2 B. & C. 82; 107 E.R. 313.
99 *Bowker* v. *Burdekin* (1843) 11 M. & M. 128; 152 E.R. 744.
1 *Doe* d. *Fentonian* v. *Virgo* (1826) 4 L.J. (o.s.)K.B. 283; *Christie* v. *Winnington* (1853) 8 Exch. 287; 155 E.R. 1355.
2 *Rowley* v. *Rowley* (1854) Kay 242; 69 E.R. 103.
3 [1947] 1 K.B. 447.

paid on June 21 the delivery of the conveyance dated back to April 10, so that a notice to quit given on April 12 was validated. Counsel for the plaintiff had relied on the following passage in the judgment of Farwell L.J. in *Foundling Hospital* v. *Crane* [4]: " The rules relating to escrows are thus stated by Preston in his book on *Abstracts* [5] ' . . . on the second [*i.e.*, the effective] delivery of the writing it will have relation, for the purposes of title, and not for the purpose of giving a right to intermediate rent, etc., from the delivery: (4) So as the conditions be performed, and the deed delivered a second time, the deed will be good, notwithstanding the death of both or either of the parties before the second delivery '; and Sheppard's *Touchstone* [6] is to the same effect." The Court of Appeal held that this passage did not establish the plaintiff's contention, since as there was no right to " intermediate rent, etc.," from the time of the original delivery, there was also no validation of a notice to quit given at a time when the fee simple was not vested in the person giving it.[7]

Effect of an Escrow

The preceding point leads naturally to a consideration of the effect of delivery as an escrow. It is of the essence of such a delivery that the deed is inoperative until the condition on which it is delivered is performed.[8]

Of more interest for present purposes is the effect when the condition *is* performed, the basis of this article being the simple example of a condition of payment of the purchase-money. It has, typically enough in this topic, been long established that the death of either the grantor or the grantee does not prevent the deed validly operating on the subsequent performance of the condition.[9] Thus on performance of the condition the deed is to be treated as having been executed, *i.e.*, signed, sealed and delivered, absolutely and effectively at the time of delivery as an escrow.[10] This retrospective operation may be further illustrated by quoting again from the judgment of Cross J. in the *Windsor Refrigerator* case [11]: " It is clear that a grantor cannot deliver a deed as an escrow if he has

4 [1911] 2 K.B. 367 at p. 377.
5 2nd ed., Vol. 3, p. 65.
6 8th ed., pp. 58–60.
7 See *per* Morton L.J. at p. 455.
8 See *Degoze* v. *Rowe* (1591) Moore K.B. 300; 72 E.R. 592; *Gudgeon* v. *Besset* (1856) 6 E. & B. 986; 119 E.R. 1131. The facts and decision in the latter case were, in effect, on all fours with those in *Thompson* v. *McCullough*, *supra*.
9 *Perryman's Case* (1599) 5 Co.Rep. 84a; 77 E.R. 181; *Frosett* v. *Walshe* (1616) J.Bridg. 49; 123 E.R. 1192.
10 *Graham* v. *Graham* (1791) 1 Ves. 272; 30 E.R. 339.
11 [1960] 3 W.L.R. at p. 119.

at that date no capacity to execute a deed at all; *e.g.*, a deed executed by an infant will not bind him even if he comes of age before the condition is fulfilled." The learned judge adds that " the view is expressed in *Williams on Vendor and Purchaser* [12] that if a man delivers a conveyance of land as an escrow at a date when he has not got the legal estate conveyed but subsequently obtains it before the condition is fulfilled, the deed will not carry the legal estate to the grantee on fulfilment of the condition." But this view must be regarded as expressed *per incuriam* since it appears to overlook and is inconsistent with the well-known cases on " estoppel, tenancy by and feeding the." [13] If that view were correct, one important aspect of present-day conveyancing practice would be entirely invalidated. Not only does the vendor customarily execute the conveyance some time before completion, but also more often than not the purchaser has already executed the conveyance (*e.g.*, if it contains covenants on his part) the vendor's solicitors having sent it to him via his solicitors for this purpose before sending it to their own client for execution. The point is that the purchaser's solicitors find it convenient, where the purchaser is borrowing money on the security of the property, to send both the conveyance and the mortgage deed to their client for execution at the same time. Thus the purchaser delivers the mortgage deed in escrow at a date when he has not got the legal estate although he subsequently obtains it. Of course, in practice, all the documents are dated as at completion date and no questions are ever asked. But the writer wonders whether, on this argument, there can truly be said to be any *scintilla temporis* [14] between the feeding of a tenant's estoppel and the feeding of a mortgagee's estoppel. However, as already noticed, the retrospective operation does not carry intermediate rent and profits nor, presumably, make the grantee liable for intermediate outgoings, and does not validate a notice to quit given in the meantime by the grantee. Also, in *Hooper* v. *Ramsbottom*,[15] the vendor having handed to his solicitor the conveyance as an escrow to take effect on payment of £330, being the balance of the purchase-money, together with the title deeds, later persuaded his solicitor to release the title deeds and deposited them with his bankers to secure an overdraft of several thousand pounds. The vendor having become bankrupt, the purchaser claimed and was held entitled to the title deeds on payment of the £330, which had been regularly tendered to the bankers, since the vendor had

[12] 3rd ed. (1922), pp. 1184, 1185.
[13] See *Church of England B.S.* v. *Piskor* [1954] Ch. 553, and the cases there cited.
[14] As in *Church of England Building Society* v. *Piskor*, *supra*.
[15] (1815) 6 Taunt. 12; 128 E.R. 936.

no right over the title deeds except to hold them until the purchaser paid the £330. Thus it inescapably appears that once a vendor has signed, sealed and returned the conveyance to his solicitor as an escrow, he can no longer effectively deal with the land; it is as if the indefeasible legal estate were already in the purchaser so that registration under the Land Charges Act, 1925, of an estate contract is rendered unnecessary to preserve priority.

How many solicitors, never mind their clients, have appreciated the full effect of obtaining, in accordance with common practice, their clients' signatures (" where indicated in pencil opposite the red seal, in the presence of a witness, who should give his or her address and occupation, without dating and then return ") on conveyances? The effect normally will be that thereafter the vendor-client is irretrievably committed: he cannot back out, he cannot deal with the land, he can only wait for the purchaser to perform the condition of the escrow, be it tendering the 90 per cent. balance of the purchase-money, or executing a counterpart lease. Thus in *Beesly's* case, Harman L.J. asked [16]: " What is an escrow? Can a body or individual, having executed a document under seal as an escrow subject to a condition, resile before the condition is accepted? " and answered [17] " An escrow is no less than a man's act and deed because there is a condition outstanding than is a perfectly completed deed handed over." However, the learned Lord Justice does qualify this statement [17]: " If, of course, the condition be never performed it never becomes binding, and I suppose there must come a time, if there be unreasonable delay in the performance of the condition, when, in these days at any rate where equitable principles govern the actions of the court, the person or firm that has executed the escrow would be released from its obligation," as does Lord Evershed M.R.[18]: " No doubt if performance of the condition is long enough delayed, the party who has delivered the deed might be relieved in equity from any further consequences."

As a contrast to the vendor's position, the purchaser is *not* equally committed, he need not perform the condition and will then only be liable to the vendor's remedies on the contract to which he may have defences.

However, it appears that the death of the vendor after execution of a conveyance as an escrow and before payment of the balance of the purchase-money (or performance of other conditions)

16 [1961] 1 All E.R. 90 at p. 93.
17 *Ibid.* at p. 94.
18 *Ibid.* at p. 95.

is not entirely without effect.[19] In *Newton* v. *The Metropolitan Ry.*[20] a vendor handed a conveyance to his solicitor as an escrow on the condition of the purchaser paying the purchase-money to the vendor's solicitor to whom the vendor at the same time gave a written authority to receive it, having also given the purchaser a written direction to pay the solicitor. Then, before any such payment, the vendor died. Kindersley V.-C. held, *inter alia*, that the death of the vendor determined the authority of his solicitor to receive payment so that the purchaser could not perform the condition, although the vendor's executors having obtained probate could compel payment.

This decision indicates a possible argument in support of the position as it is generally understood. The vendor cannot revoke his conveyance but he can revoke his solicitor's authority to receive the purchase money. Of course, by section 69 of the Law of Property Act, 1925, a receipt clause may constitute sufficient authority to pay the vendor's solicitor but, in the circumstances envisaged, it is thought that no protection or assistance would be afforded to a purchaser tendering the purchase-money to the vendor's solicitor in purported performance of the condition of an escrow; " sufficient " presumably not meaning " absolute," [21] and under section 69 the deed must actually be produced at the time of payment, mere possession not being equivalent.[22] However, this argument conflicts sharply both with the rule stated above that performance of the condition must be beyond the control of the grantor and with the rule stated by Cross J. in the *Windsor Refrigerator* case [23] as follows: " Thus, the death of the grantor renders an undelivered deed forever incapable of having any effect, but it has no effect on an escrow which will become binding on the grantor's estate if and when the condition subject to which it was delivered is fulfilled." [24] The true position must surely be that the condition is sufficiently performed if the purchaser is ready, able and willing to pay the purchase money when called upon to do so. This follows from the decision in the *Beesly* case, although there the condition was not payment of the purchase money: " In the present case the only condition, which, in my view, could be spelt out of the facts attending delivery of the lease by the [landlords] is, as the learned judge held, that the [tenant] should

19 *Cf. Perryman's Case* (1599) 5 Co.Rep. 84a; 77 E.R. 181; *Frosett* v. *Walshe* (1616) J.Bridg. 49; 123 E.R. 1192.

20 (1861) 1 Drew & Sm. 583.

21 *Cf. Re Duce & Boots Cash Chemists (Southern), Ltd's Contract* [1937] Ch. 642

22 See *Day* v. *Woolwich E.B.S.* (1888) 40 Ch.D. 491.

23 [1960] 3 W.L.R. 109 at p. 116.

24 And see the cases cited above, p. 145.

execute and deliver her counterpart, which she did. If there were the further condition that, having done this, she should send that counterpart to the [landlords], she has at all times been ready and willing to do so," *per* Donovan L.J.[25] Thus, rather startlingly, it would appear sufficient in order to complete execution of a conveyance that the purchaser should be in funds without any necessity for him actually to tender payment. It is true that thereafter the purchaser is a debtor who, in accordance with the ordinary rule,[26] must seek out his creditor and offer payment in legal currency, but this would not stop the legal estate passing on performance of the condition. Until tender of payment, of course, the vendor will have an unpaid vendor's lien, normally protected by retention of the title deeds without registration under the Land Charges Act, 1925. However, in the interests of certainty and despite the above, the courts might well hold that the purchaser was not shown to be ready and willing to make payment, and consequently the condition of the escrow not performed and the legal estate not passed, in the absence of tender (compare the cases on estate agents' commission, of which the latest two are *Acroyd & Sons* v. *Hasan* [27] and *Drewery and Drewery* v. *Ware-Lane* [28]). Further, non-accepted tender may penalise the vendor as to the costs of any subsequent legal proceedings.[29]

Conclusion

In the circumstances envisaged at the outset of this article, namely, of a vendor refusing at the eleventh hour to complete the sale, there will almost certainly be brought into play provisions of the contract for sale between the parties relating to delay in completion. Accordingly, relying on the proviso to condition 7 of the Law Society's Conditions of Sale, 1953, for example, the purchaser's solicitor may be expected at once to deposit the balance of the purchase money and notify forthwith the vendor's solicitor. By so doing, under the condition mentioned, he will bind the vendor (the delay not being solely the purchaser's fault) to accept the bank deposit interest, if any, rather than recovering £5 per cent. per annum. After this, if the delay is prolonged, he may advise his client as to specific performance, damages or rescission.

However, as was indicated at the outset, and, it is thought, subsequently demonstrated, the purchaser has an alternative course of action, namely of tendering the balance of the purchase money

25 [1961] 1 All E.R. 90 at p. 95.
26 *Walton* v. *Mascall* (1844) 12 M. & W. 451.
27 [1960] 2 W.L.R. 810.
28 [1960] 1 W.L.R. 1204.
29 See R.S.C., Ord. 22, r. 3.

and *thereby* completing the purchase. Such tender could be made immediately (and in any case, it seems, within a reasonable time) in the hope that the vendor has in fact delivered the conveyance in escrow. If the tender is refused then, also immediately, the money could be placed on deposit which will safeguard the purchaser's position in the event of the escrow argument failing. Of course, it is advisable also to perform any other conceivable conditions of the escrow, such as adjusting the balance of the purchase-money in accordance with the completion statement or undertaking to do so, offering an authority to the stakeholders to release the deposit, offering to execute the conveyance if required or actually executing any duplicate or counterpart. Thereupon, assuming that the subject-matter is *un*registered land, the legal estate will actually pass to the purchaser. Indeed, the purchaser, to the detriment of any innocent third parties, has had more than a mere equitable interest requiring registration and depending upon the rules of equity ever since the date of delivery of the conveyance in escrow by the vendor. If a company is the vendor, perhaps the legal estate passed immediately on sealing, though it seems unlikely that this will be held to be so.

Naturally, the adoption of this simple alternative course of action will be bedevilled by practice. Hitherto, the complications arising where mortgagees are involved have been largely ignored. First, if the purchaser by virtue of making tender obtains the legal estate, he may well find that he has it subject to one or more outstanding mortgages, intended to be discharged by the vendor on completion, although he may be able to deal with this problem out of the balance of the purchase-money remaining in his hands. Secondly, the adoption of the course of action depends upon the purchaser being able to make tender, but today the chances are that he will be unable to do so unless his mortgagee can be persuaded to join in the escrow game, and, remembering the store placed by banks and building societies on title deeds, this is difficult to imagine.

Further, in contrast to the vendor who is basically interested in cash on completion, the purchaser or his solicitor invariably requires on completion to see and obtain a number of documents, so that by adopting the course suggested certain risks, occasionally serious, may be run, to say nothing of the post-completion inconvenience of inability, *e.g.*, to stamp or to register. However, to put it at rock bottom, adoption of the course suggested on behalf of the purchaser should certainly remain open for consideration, in appropriate circumstances, as potentially a very effective remedy.

On the other hand, the vendor may not, if the circumstances

are appropriate (as they were in the *Beesly* case), find the escrow game amusing, nor in view of its uncertainties may the legal advisers of any of the parties. Some measure of certainty can be achieved for all concerned by actually writing the conditions of a delivery in escrow into the conveyance itself. But better still, it is thought, would be to avoid escrows like the plague. This could be done both simply and cheaply by having the vendor authorise his solicitor by deed to deliver the conveyance (which the vendor has signed, adopting the seal) on his behalf at completion. This is, it is felt, preferable to having the vendor appear in person at completion, provided always the necessary power of attorney is strictly worded to protect the vendor, complies with section 127 of the Law of Property Act, 1925, to protect the purchaser and is handed over on completion. If this method were adopted for *all* deeds, then practice and law would coincide and the date of completion really would be the relevant and effective date.

Finally, it is contended with some feeling that most if not all of the rules reverently applied to deeds and in particular to delivery thereof might well be jettisoned. Talking of an appointment of a receiver to be made in writing after demand for payment, Harman L.J. said in the *Windsor Refrigerator* case [30]: "Counsel for the plaintiff's assumption that one must write it all out after the demand is made, and one is not entitled to carry a piece of paper in one's pocket with the words written on it, and produce that piece of paper if and when one needs it, seems to be an absolute novelty, and not convenient in practice, or right in law. I can see no reason why one should not write down words on a piece of paper and keep them in one's bosom or one's pocket-book, and produce them at the right moment. Nor do I see why, if one so produces them, they should not have effect at the moment when one produces them to the proper person, here the receiver." But if that piece of paper needs a seal, then counsel's assumption could not be so condemned, on the contrary it all but states the law. Yet the seal itself is meaningless: "... a seal nowadays is very much in the nature of a legal fiction. The seal is no longer a wax impression of a man's crest or coat of arms; it is usually no more than an adhesive wafer attached by the law stationer when the document is engrossed. It is the party's signature, and not his seal, which in fact authenticates the document." [31] Nonetheless, when the law requires a seal, the rules of convenience are reversed and the

[30] [1961] 1 All E.R. 277 at p. 284 and see Lord Evershed M.R. at p. 282 I.
[31] *Per* Lord Goddard, Sixth Interim Report of Law Revision Committee (1937), Cmd. 5449, p. 35.

expectations of conveyancer's thwarted. The practice of the profession, although it not only evidences but indeed makes the law,[32] cannot *un*make the law. Common sense, for that is what practice is, has decided that the rules relating to the execution of deeds should not differ from those relating to other documents, and that the position both between the parties and as against third parties should be the same on completion of a conveyance as on exchange of contracts. Unfortunately, common sense cannot prevail—this bed has been too long made by the courts for them to sleep in any other and the topic is, without doubt, beneath the attention of Parliament. The only possible conclusion is that for practice to be valid it must be amended to accord with the law.

[32] See *per* Denning L.J. in *Re Downshire Settled Estates* [1953] Ch. 218.

PARTNERSHIPS AND ESTATE DUTY

By E. H. Bodkin, Barrister-at-Law

Under an ordinary commercial or professional partnership under which each of the partners contributes a part of the capital or other assets, or an incoming partner pays a premium for his share, estate duty is payable on his death alone in respect of his share, and no question arises as to any liability for duty on the death of another partner from whom the share has been derived on the ground that he has made a gift thereof to such partner. But it must be borne in mind that if the surviving partners have an option to acquire the deceased partner's share which excludes payment for goodwill, his share of goodwill will it seems nevertheless pass on his death and be dutiable accordingly.[1]

In regard to partnerships under which a partner's share includes a share in industrial hereditaments, machinery or plant, a reduced rate of duty is chargeable under section 28 of the Finance Act, 1954. This is so even if the surviving partners have an option to acquire the share, provided the option is on the usual terms, based on the value of the share, or even if they are bound to purchase it, or if the partnership is to be wound up under the Partnership Act. It was held in *Burdett-Coutts* v. *I.R.C.*[2] that in all such cases what passed on the deceased partner's death was an interest in the assets. Formerly it was the practice not to allow the relief unless the right of the deceased partner was to a share of the assets *as such*, or his share passed to a beneficiary under the articles, and not when the partnership was at will and sections 33 and 44 of the Partnership Act applied.

The same applies under section 23 of the Finance Act, 1925, as amended by section 28 (1) of the Finance Act, 1949, to agricultural property. It is therefore unnecessary, in order to preserve the relief in such cases, to insert only an option for the surviving partners to purchase the share in partnerships of the above nature.

Where there is an element of gift in the provisions of the partnership, the position as to estate duty may be different from that in a purely commercial partnership. This element may arise in the case of:

1 *Perpetual Executors & Trustees Association of Australia* v. *Commissioners of Taxes of the Commonwealth of Australia* [1954] A.C. 114.

2 [1960] 3 All E.R. 153.

(1) the advancement of a son by taking him into partnership and giving him a share, where the son himself puts up no part of the capital;
(2) the passing of the father's share on his death to a son without payment;
(3) the introduction of a son into the partnership under a power in the partnership articles;
(4) the charge of an annuity on the profits payable to a deceased partner's widow.

Paragraphs (1) and (2)

Normally the allocation of part of his father's share in the business to a son will be a voluntary disposition within section 59 of the Finance (1909–10) Act, 1910, if the son contributes no part of the cash capital or assets himself. This is so notwithstanding the general principle that the contribution of labour or skill is sufficient consideration to support a partnership agreement. In such a case the son's covenant to attend to the partnership business does not of itself amount to full consideration in money's worth within section 3 (1) of the Finance Act, 1894.

Estate duty will therefore be payable in the event of the father's death within five years on the son's share and will be charged on the share. The duty will be charged under section 1 of the Finance Act, 1894.[3]

But in certain circumstances the transaction may constitute a purchase by the son of the share provided for him by his father for full consideration in money's worth within section 3 (1) of the Finance Act, 1894. The case would fall within the principle of *Att.-Gen.* v. *Boden*,[4] though this case actually was concerned with the passing of the father's share of goodwill on his death to his sons without payment.

In *Att.-Gen.* v. *Boden*,[4] a partnership between the father and his sons provided that the sons were to give so much time and attention to the business as the proper conduct of its affairs should require, and should not without the consent of the other parties engage in any other trade or business, but that the father should not be bound to give more time and attention to the business than he should think fit. The partnership was to last for the father's life if any two of the partners should so long live. On the death of the father or on his otherwise ceasing to be a partner, his share

[3] *Perpetual Executors & Trustees Association of Australia* v. *Commissioners of Taxes of the Commonwealth of Australia*, *supra*.
[4] [1912] 1 K.B. 539; 81 L.J.K.B. 704 (where the judgment is more fully reported).

was to accrue to the sons subject to their paying the value thereof to his personal representatives, but nothing was to be paid for goodwill, which was to accrue without payment. There was in fact little goodwill in the business. It was held that the goodwill, which was deemed to pass, did so only by reason of a bona fide purchase by the sons for full consideration in money's worth within the meaning of section 3 (1).

Hamilton J. said that it was quite true that the Finance Act, 1894, had provided fathers with a motive for doing good by stealth which did not previously exist, and he was inclined to think that the Revenue authorities were sometimes disposed to suspect fathers of the virtues of benevolence, where they had really acted in the most selfish spirit. But for the family relationship no one would have suspected this of being an underhand mode of making a present to the sons in order to escape payment of estate duty. The provisions of the deed could be considered according to the test suggested in *Brown* v. *Att.-Gen.*,[5] namely, whether, looking at the transaction as a whole, it was merely a partnership deed regulating the contractual relations between the partners, or whether it was of a composite character, containing provisions in favour of the sons which would not ordinarily be found in what was merely a partnership deed. The contract was one and indivisible, and one of its terms must not be isolated from another. It might fairly be considered as merely a partnership deed, and not as in part a settlement making provision for children, and the blood relationship might be eliminated. It was a very reasonable bargain for the father to make if he wished to prevent his sons, who knew a great deal about the business, from setting themselves up in rivalry with him, and to have the business carried on with his capital so long as he might live, and to bargain with them that if they gave their time and skill to the business and let him have the lion's share of the profits, he would let them have the business, provided they paid his personal representatives the value of the tangible assets. He might have lived twenty years and during all that time he was not bound to give more time and attention to the business than he chose.

The principle of *Att.-Gen.* v. *Boden* (*supra*) is considered by the Revenue to be confined to goodwill cases.[6]

It seems that in a case not falling within *Att.-Gen.* v. *Boden*, the Revenue could in some cases claim duty on the whole of the share on the father's death even outside the five-year period.

[5] (1898) 79 L.T. 372.
[6] *Cf. Re Clarke* (1906) 40 I.L.T. 117.

In *Chick* v. *Commissioners of Stamp Duties* [7] a father gave land to one of his sons. Subsequently a partnership was entered into between the father, the son to whom the land had been given, and another son, and the land previously given, together with land of the father and the other son, was brought into the partnership. On the death of the father outside the five-year period, duty was held to be chargeable in respect of the land given to the son.

It was not disputed that the son had assumed bona fide possession and enjoyment of his land to the entire exclusion of the father; but it was held that the son had not *retained* bona fide possession and enjoyment of it to the entire exclusion of the father or of any benefit to him, inasmuch as all the partners and each of them were in possession and enjoyment of it. Even if the partnership was an independent commercial transaction and the father gave full consideration for his rights, this was immaterial.

This decision was overruled by section 35 (2) of the Finance Act, 1959, under which the retention of the actual occupation of land or actual possession of chattels is to be disregarded for the purpose of duty where the retention is for full consideration in money or money's worth.

The application of the above section to cases where a father gives a share to his son on taking him into partnership is difficult; it seems that in such a case it will not apply, and duty could still be claimed on the father's death outside the five-year period. There would be no full consideration in money or money's worth passing from the father, and the transaction would not ordinarily be a genuine commercial transaction.

It seems clear that the same would apply to a share given to a person other than a son or wife. Voluntary dispositions are not confined to those in favour of relatives; but it would seem that in the case of a stranger it would usually be presumed that full consideration was given by both parties—*cf.* the observations of Hamilton J. in regard to the earlier partnership in *Att.-Gen.* v. *Boden*.[8]

Chick v. *Commissioners of Stamp Duties* [7] does not, however, apply where land already subject to a partnership of which the father is a member is subsequently given to a son. The gift will be a gift shorn of the partnership rights—*Munro* v. *Commissioners of Stamp Duties*.[9]

[7] [1958] A.C. 435.
[8] [1912] 1 K.B. 539 at p. 562.
[9] [1934] A.C. 61.

Paragraph (3)

If the power to introduce a son is exercised by deed to take effect on the father's death, or by will, there will be a settlement with reservation, and duty will be payable under section 2 (1) (*c*) of the Finance Act, 1894.[10] If the power is exercised by deed, and the exercise takes effect at once, duty would be payable on the footing that the exercise was a voluntary disposition [11] or as a disposition in favour of a relative under section 46 of the Finance Act, 1950.

Paragraph (4)

Duty will be payable under section 2 (1) (*c*) of the Finance Act, 1894, on the death of a partner who has charged an annuity on the profits to commence from his death, the duty being assessed on the value of the annuity—*Att.-Gen.* v. *Gosling*.[10] There is an alternative claim on the footing of a voluntary disposition. Duty is also chargeable if the annuity is charged by the partnership articles themselves.[12] But if the annuity is not charged on the profits, but is only secured by the bond of the surviving partners, no duty will be payable.[13] If the annuitant cannot legally enforce payment of an annuity no duty will be payable. This may be so if the annuitant is not a party to the grant of the annuity.[14] If the annuitant can enforce the payment of an annuity not charged on the profits (*e.g.*, if the covenant is made with a trustee for him) duty will not be payable on the death of the partner under section 2 (1) (*d*) if the widow's right is vested before the death.[15]

The partnership deed may constitute a trust for the annuitant, in which case the annuitant could enforce payment.[16]

[10] *Att.-Gen.* v. *Gosling* [1892] 1 Q.B. 545.
[11] *Dymond on Death Duties* (13th ed.) p. 975.
[12] *Att.-Gen.* v. *Wendt* (1895) 65 L.J.Q.B. 84.
[13] See *Re Miller's Agreement* [1947] Ch. 615.
[14] *Ibid.* See, however, the judgments of Lord Denning in *Smith* v. *River Douglas Catchment Board* [1949] 2 K.B. 500 and *Drive Yourself Hire Co. Ltd.* v. *Strutt* [1954] 1 Q.B. 250.
[15] *Westminster Bank Ltd.* v. *I.R.C.* [1958] A.C. 215.
[16] *Re Flavell* (1883) 25 Ch.D. 89.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, LLB., Solicitor

Lewis v. *Frank Love Ltd.* [1961] 1 W.L.R. 261; [1961] 1 All E.R. 446 (Ch.D.)

Mortgage—clog on the equity—option to purchase in transfer of mortgage arranged by mortgagor.—A mortgagee is not allowed, at the time of the loan, to enter into a contract with the mortgagor for the purchase of the mortgaged property. Such an option prevents the mortgagor getting back his mortgaged property and is therefore void as "clogging the equity" (*Samuel* v. *Jarrah Timber & Wood Paving Corpn.* [1904] A.C. 323; *Reeve* v. *Lisle* [1902] A.C. 461; *Toomes* v. *Conset* (1745) 3 Ath. 261). In the first case cited the House of Lords applied the rule with some regret, Lord Macnaghten remarking that there had been a "fair bargain between men of business without any trace or suspicion of oppression, surprise or circumvention" ([1904] A.C. at p. 325). Such bargains, it will be recalled, may be upheld where they relate either to collateral arrangements which do not prevent redemption, or to postponements of the right to redeem (*Kreglinger* v. *New Patagonia Meat and Cold Storage Ltd.* [1914] A.C. 25; *Knightsbridge Estates* v. *Byrne* [1939] Ch. 441 (C.A.)). An option to purchase, however, can only be upheld if contained in a separate subsequent transaction (*Reeve* v. *Lisle, supra.*)

In the present case the plaintiff, the mortgagor, against whom judgment for just over £6,000 had been obtained on an existing mortgage, desired to raise £6,500 on the property, and found the defendants willing to lend that sum provided they obtained an option to purchase part of the land for £1,000. Some discussion as to the form of the transaction took place between the solicitors; eventually the defendants took a transfer of the existing mortgage and a second document of the same date created the option. Differences subsequently arose; the further £500 was not advanced and on a purported exercise of the option the plaintiff sought a declaration that it was invalid.

Plowman J. was pressed with the argument that in no case had the doctrine of clogging the equity been applied to a transfer of a mortgage. This argument he rejected, finding on the facts that the loan of £6,500 and grant of the option were all one transaction. "But in my view the principles on which the courts have held that a clog on the equity of redemption is void apply just as much to a transfer which is arranged between the mortgagor and the transferees. . . ." ([1961] 1 W.L.R. at p. 267; [1961] 1 All E.R. at p. 451). Consequently the option to purchase was held void as a clog on the equity of redemption.

Attorney-General v. *St. Ives Rural District Council* and another [1961] 2 W.L.R. 111; [1961] 1 All E.R. 265 (C.A.)

Highway authority—duties in regard to drains—nature of drains—"functions in respect to highways"—Local Government Act, 1929, *s.* 30 (i).—This case arose out of a dispute between the St. Ives Rural District Council and the Huntingdon County Council as to responsibility for the repair of two drains. It was agreed that the effect of an award under the Inclosure Act, 1800, the Highway Act, 1862, s. 11, and the Local Government Act, 1894, s. 25 vested the duty of repair in the St. Ives R. D. C., and the question was whether this duty had been transferred to the county council by the Local Government Act, 1929, s. 30 (i). That section made county councils the highway authorities for highways in rural districts but contained a proviso (now contained in the Highways Act, 1959, s. 306) that it should not affect functions of rural district councils "not being functions with respect to highways."

The Court of Appeal (Sellers, Pearce and Devlin L.JJ.) in a considered judgment delivered by Pearce L.J., affirmed the decision of Salmon J. in the court below, holding that the phrase "function with respect to highways" must be interpreted not by reference to the history of highways but "as a matter of fact by a contemporary consideration of the land itself." Consequently Salmon J. had applied the right test in considering the extent to which these drains drained land, or the highway, and there was no ground for disturbing his decision of fact that they were land drains, so responsibility remained with the St. Ives R. D. C.

Windsor Refrigerator Co. Ltd. and another v. *Branch Nominees Ltd. and others* [1961] 2 W.L.R. 196; [1961] 1 All E.R. 277 (C.A.)

Deed—delivery—escrow—ability to recall—ineffective deed operative as instrument in writing.—The Court of Appeal (Lord Evershed M.R., Harman and Donovan L.JJ.) has reversed the decision of Cross J. (noted *ante,* vol. 24 at p. 428 where the facts are given) though agreeing with much of his judgment. It will be recalled that the action was brought on a preliminary point of law to determine the effect of a document, executed as a deed, purporting to appoint a receiver.

The Court of Appeal agreed with Cross J. (i) that a deed executed on February 25, 1958, could not be effective to appoint a receiver on February 28, 1958, if the latter was the date when the demand for payment, a condition precedent to the appointment, was made, (ii) that a deed executed subject to recall is nothing—neither a deed nor an escrow and (iii) that the rule that on performance of a condition an escrow may take effect as a deed from the date of delivery might not operate in all circumstances (see *Thompson* v. *McCullough* [1947] K.B. 477). However, the Court of Appeal held, here reversing Cross J., that an ineffective deed can take effect as an instrument in writing and that such an instrument can be made, kept till needed, and then produced to become then effective. Lord Evershed M.R., with whose words the other Lords Justice expressed agreement, said "I conceive

that if an individual sets out to execute a deed, and for some reason the instrument is not effectively a deed (say, because of the absence of a seal or the absence of attestation) it cannot be said that therefore it is not, and cannot be, an instrument in writing and his instrument in writing . . . in the case of a writing it is perfectly competent that it should be made out, that it should come into existence, on a day before it is intended to take effect, and does take effect. . . ." ([1961] 2 W.L.R. at pp. 205–9; [1961] 1 All E.R. at p. 282). Consequently the appointment of the receiver was *prima facie* good, since the writing was produced immediately after non-compliance with the demand for payment.

The differences between a deed and an instrument in writing have been considerably reduced so far as the formalities of execution are concerned (Law of Property Act, 1925, s. 73; *Stromdale and Ball* v. *Burden* [1952] Ch. 223.) But unless an agent is appointed by deed (when he is called an attorney) he cannot validly execute a deed on behalf of his principal (*Berkeley* v. *Hardy* (1826) 5 B. & C. 355). In the ordinary case of a sale, lease or mortgage the client "executes" the deed at his home and returns it to his solicitor to produce and hand over on completion. Such a document must, it seems from the present case and the Court of Appeal's decision in *Beesley* v. *Hallwood Estates Ltd.* [1961] 2 W.L.R. 36; [1961] 1 All E.R. 90, operate as an escrow and become effective when the other party does his part, *e.g.*, tenders the purchase money. In other words, the legal estate may pass even though the vendor is refusing to complete. Or, putting it another way, a solicitor who accepted his client's instruction not to complete might, if the conditions of the escrow were fulfilled, be liable for detinue or conversion of the purchaser's title deeds. Should there not be some reconsideration of the rule requiring an agent to deliver a deed to be appointed by deed?

In the present case the Court of Appeal criticised strongly, as Cross J. had done, the adoption of the procedure of preliminary issues. Harman L.J. expressed this view vividly; after concurring "with particular heartiness" with the Master of the Rolls on this point, he said "It is highly undesirable that the court should be constrained to tie itself in so many knots, and in the end merely say: 'Well if this was thus, then that was so.'" ([1956] 2 W.L.R. at p. 210; [1961] 1 All E.R. at p. 283.) Yet one cannot but recall that the preliminary issue in its Scots form is responsible for our present law of negligence, for *Donoghue* v. *Stevenson* [1932] A.C. 562 was so tried; whether the snail ever was in the ginger-beer bottle has never been conclusively decided.

Weston v. *Laurence Weaver Ltd.* [1961] 2 W.L.R. 192; [1961] 1 All E.R. 478 (Q.B.D.)

Easement—common right of way—whether one dominant owner entitled to claim against another for damage to servient tenement.—A novel point of law here arose concerning a very common situation of fact. The plaintiff and defendant company were each entitled to a legal easement of way over a private road to which their respective

dominant tenements were contiguous. The defendant company used the road for access to a building site and the point of law now raised (as well as other matters not reported) was whether the plaintiff could claim damages for wear and tear to the private road—that is, for physical damage to the servient tenement. Counsel were unable to discover any previous authority on this point. Lawton J. held that "on principle the plaintiff cannot claim for physical damage to the servient tenement. His right to damages lies in an unlawful interference with his right to pass and repass, and unless the damage caused to the servient tenement substantially interferes with his right to pass and repass, in my judgment he has not succeeded in establishing a cause of action" [(1961] 2 W.L.R. at p. 195; [1961] 1 All E.R. at pp. 479, 480).

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2. *TRUSTS*

Purnell v. *Purnell* [1961] 2 W.L.R. 185; [1961] 1 All E.R. 369 (P.D. & A.)

Variation of settlement—adopted child—jurisdiction to admit—benefit to existing beneficiaries—Matrimonial Causes Act, 1950, *s.* 25.—The Adoption Act, 1958, s. 16, replacing the Adoption Act, 1950, s. 13, gives to an adopted child rights equal to those of natural legitimate children under any will or settlement made after the date of the adoption order. Nevertheless where variation of ante-nuptial or post-nuptial settlements is sought on a decree of divorce or nullity, under the Matrimonial Causes Act, 1950, the court has jurisdiction to confer benefits on an adopted child who cannot claim under the Adoption Act. This jurisdiction was established by the decision of Karminski J. in *Best* v. *Best* [1955] P. 76 and has now been applied by Cairns J. in the instant case. Both judges relied upon a line of cases (*e.g. Atkins* v. *Atkins and Urquhart* [1913] P. 211; *Scollick* v. *Scollick* [1927] P. 205; *Newsom* v. *Newsom* (1934) 50 T.L.R. 399; *Garforth-Bles* v. *Garforth-Bles* [1951] P. 218) which had established jurisdiction to confer benefits on the spouse and issue of a second marriage under the statutes preceding the Matrimonial Causes Act, 1950, and which must consequently be taken to have been confirmed by Parliament. The cases require, however, that the variation must benefit not only the stranger which it introduces but also the children interested directly under the settlement. Such benefit, Cairns J. held, following *Best* v. *Best, supra,* must be financial as well as sentimental; the court must not accede to a parent's desire to bring up natural (legitimate) and adopted children on terms of equality at the price of uncompensated sacrifice by the former. On the somewhat complicated proposals in the present case the learned judge held (i) a division in the proportion of three-eights to each of the two natural legitimate sons and one quarter to an adopted daughter was proper, on account both of the lesser needs of a girl and of the relationship; (ii) extinction of the father's power to appoint between the sons was beneficial—"the assurance of obtaining a fixed share of a fund is of more value than the uncertain prospect of obtaining a greater or less share of it";

(iii) extinction of the father's power to appoint to the wife and issue of a second marriage—he being aged 42—was also a benefit.

Cairns J. also remarked that the Variation of Trusts Act, 1958, did not assist the adopted daughter because she had no interest under the existing settlement.

Re Wernher's Settlement Trusts [1961] 1 W.L.R. 136; [1961] 1 All E.R. 184 (Ch.D.)

Settlement—class gift—distribution—class-closing rules— applicability to settlement inter vivos.—By a settlement made in 1931 the settlor declared that the trust fund should be held "in trust for all such of the children of the settlor (whether now living or hereafter to be born) as being male attain the age of twenty-one years or being female attain that age or marry. . . ." At the date of the settlement the settlor had three children, a son aged twelve, and two daughters aged eleven and six; at the date of the summons the son had attained twenty-one and died, while the daughters had attained twenty-one and married, and the settlor was still alive. The son's personal representatives and the daughters claimed that the trust fund should be distributed, arguing that the rule in *Andrews* v. *Partington* (1791) 3 Bro.C.C. 401 applied. That rule (on which there is an authoritative discussion by Dr. J. H. C. Morris at (1954) 70 L.Q.R. 61) states that where there is a gift to a class the period of distribution is the time when a member of the class is first able to call for his share; the class is then closed so as to exclude persons subsequently born, so that at any rate a minimum share can be distributed. The rule is said to be based on a conflict in the testator's or settlor's instructions, in that distribution cannot take place at the date indicated if all afterborn persons may be included in the class. In the present case the date of closure would have been the son's attaining twenty-one; his two living sisters would be entitled to a share on qualifying but possible afterborn children of the settlor would be excluded. The question was whether the terms of the settlement excluded the operation of the rule.

Buckley J. held (1) the rule applies to settlements *inter vivos* as well as wills, referring to *Re Knapp's Settlement* [1895] 1 Ch. 91, (2) that the rule was not excluded by a contrary intention. The rule in *Andrews* v. *Partington*, though often called a rule of convenience, is a rule of construction in the sense that it can give way to a contrary intention (*Re Bleckly* [1951] Ch. 740). Nevertheless it is well settled that a will penned in terms inviting the application of the rule must be deemed to have been drafted with the rule in mind, so that mere references "all or any" (*Re Bleckly, supra*) or to children "hereafter to be born" (*Gilbert* v. *Boorman* (1805) 11 Ves. 238) do not exclude the rule. The necessary existence of a period between the making of the will and the earliest date of distribution, in which more members of the class may be born and so become actually or potentially entitled, gives effect to words such as those quoted. Consequently a more elaborate formula is needed to displace this very tough rule, such as that in *Scott* v. *Earl of Scarborough* (1838) 1 Beav. 154, where the class was defined as grandchildren "now born, or who shall

hereafter be born during the lifetime of their respective parents . . . and whether born or unborn when any other of them attain the age aforesaid." Buckley J. rejected the argument that there was on this point any difference between wills and voluntary settlements, following *Gilbert* v. *Boorman, supra,* and distinguishing *Scott* v. *Earl of Scarborough, supra,* and in so doing has (subject to any appeal) removed some uncertainty from the law. In this connection one may note that although the rule in *Andrews* v. *Partington* has often been criticised the learned judge did not feel able to restrict its application. He also rejected, on the authority of *Re Chartres* [1927] 1 Ch. 466, a further argument that the rule only applied if a direction to distribute was contained in the instrument; the above-mentioned "conflict" in the testator's or settlor's mind does not need to appear on the face of the will.

The decision is, therefore, a reminder of the ease with which the rule in *Andrews* v. *Partington* can produce a result unforeseen and often undesired. In the present case the testator was approximately sixty-eight at the time of the summons, so the rule may have worked a benefit in permitting distribution as Buckley J. remarked it may sometimes do—[1961] 1 W.L.R. at p. 139; [1961] 1 All E.R. at p. 187.

Re Sanderson's Settlement Trust [1961] 1 W.L.R. 36; [1961] 1 All E.R. 25 (Ch.D.)

Settlement—variation of trusts—disability—Variation of Trusts Act, 1958, s. 1 (3).—Where a respondent to an application for the variation of trusts is under mental disability, approval has to be given by the Court of Protection (formerly the Judge or Master in Lunacy —Variation of Trusts Act, 1958, s. 1 (3); Mental Health Act, 1959, ss. 118, 149 and Sch. 7, Pt. I). Pennycuick J., approving the extension of an investment clause, now held that all costs, including those of the Court of Protection, should be paid out of the trust estate (see Practice Note reported at [1959] 3 All E.R. 897).

Inland Revenue Commissioners v. *Bernstein* [1961] 2 W.L.R. 143; [1961] 1 All E.R. 320

Advancement—statutory power—whether excluded by direction to accumulate income—Trustee Act, 1925, *ss.* 32, 69. The Court of Appeal (Lord Evershed M.R., Harman and Donovan L.JJ.) has affirmed the decision of Danckwerts J. (noted *ante,* Vol. 24 p. 240) that a direction to accumulate income and add it to capital may, and in the present case did, operate as a contrary intention within section 69 (2) of the Trustee Act, 1925, so as to exclude the statutory power of advancement under section 32 of that Act. All three members of the court, and especially Lord Evershed M.R., were however concerned to point out that this conclusion was reached on consideration of the settlement as a whole. Here the trust was for accumulation during the settlor's life and only on his death was the fund to be distributed—

accumulation was the purpose of the settlement. Lesser directions to accumulate, which might operate during some part of a life interest (*per* Evershed M.R.) or as an ancillary or administrative provision dealing with some contingent event (*per* Harman L.J.), would not necessarily indicate an intention to exclude the statutory power.

The present case arose out of the Crown's claim for surtax, based upon Income Tax Act, 1952, s. 405, but it is obviously desirable that whenever accumulation is directed the trust instrument should make abundantly clear also the intention regarding powers of maintenance and advancement.

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Re Wykes' Will Trusts [1961] 2 W.L.R. 115; [1961] 1 All E.R. 470.

Validation of imperfect trusts—alternative application—tests. —The Charitable Trusts (Validation) Act, 1954, retrospectively validated certain trusts which would otherwise have been struck down by the *Diplock* decisions. The legislature had in mind the type of wording used in those cases, such as charitable *or* benevolent, but the actual wording of the Act is more abstract, and talks of trusts which could be entirely devoted to charitable purposes but need not be (whereas a true charitable trust must be solely so employed). It is ironical that the same sort of problem has now arisen here as in the *Diplock* cases themselves, and in a sense justifies the stringency of those decisions. Does the Act validate any vague trust which might without breach of trust be used for charity? Or does it require some reference to charity, and if so what kind of reference? An *obiter dictum* of Harman J., as he then was, required an alternative type of gift, to charity or . . ., but the Court of Appeal left the point open, and Ormerod L.J. thought the Act should be more liberally construed (*Re Gillingham Bus Disaster Fund* [1958] Ch. 300). Cross J. in *Re Harpur* [1960] 3 W.L.R. 607 (24 *Conveyancer*, p. 508) was inclined to follow Harman J. In the instant case, Buckley J. followed Ormerod L.J. in deciding that the Act must be construed fairly broadly and applied to all cases where the trusts appeared to be on the borderline of charity. A testator left the residue of his estate to a company as a benevolent or welfare fund for employees. The learned judge held that the words " benevolent " and " welfare " were associated with charity and figured in the titles of undoubted charitable organisations, and he therefore felt able to save the gifts in accordance with the 1954 Act, for them to be used as therein provided. The task of judges in more doubtful cases is unenviable.

(Theobald 334)

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4. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Trundle [1961] 1 All E.R. 103.

"Moneys in the bank"—restrictive construction.—Perrin v. *Morgan* [1943] A.C. 399 is again found to be of little actual help in a practical case. Cross J. went back to the old decision in *Re Prater* (1888) 37 Ch.D. 481 (C.A.) to decide that "any moneys I have in the bank" passed a credit balance and some travellers' cheques bought from the testator's bank but uncashed, and, of course, redeemable by it and constituting irrevocable cheques on it. The learned judge rejected the argument that share and savings certificates might pass under such a description. There was no residuary gift in this case, but there were legacies of a car and furniture and a devise of land. Hence the word "money" could not here be construed as a synonym of "fortune" or "estate." The fact that the securities were deposited at the bank was held to make no difference, though, with respect, this might be thought by some persons to be material. At any rate Cross J. was satisfied that people talking of money at the bank would limit it in a commonsense way to their actual account.

(Theobald, 190)

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5. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Rye v. *Rye* [1960] 3 W.L.R. 1052: [1960] 3 All E.R. 810 (C.A.)

Creation of leases—lease for three years or under—freehold owned by tenants in common in equity in equal shares—whether freeholders able to grant lease by parol to themselves—Law of Property Act, 1925, s. 72 (4).—Section 72 (4) of the Law of Property Act, 1925, provides that "two or more persons (whether or not being trustees or personal representatives) may convey and shall be deemed always to have been capable of conveying any property vested in them to any one or more of themselves in like manner as they could have conveyed such property to a third party." Section 205 (1) of the same Act provides that unless the context otherwise requires the word "conveyance" "includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument except a will" (s. 205 (1) (ii)). The Court of Appeal held that despite the definition of "conveyance" in section 205 (1) (ii) two or more persons may, since 1925, grant to themselves a tenancy of premises by parol, provided, of course, that the tenancy is for a term not exceeding three years within the meaning of section 54 (2) of the Act. Sections 52 and 54 make it clear that all conveyances need not be by deed or even in writing: and the definition of "conveyance" in section 205 (1) is not in terms exhaustive.

Upon the facts of the case, however, the court came to the conclusion that no tenancy had been created. No definite time had been agreed: and there was no evidence of any date from which the alleged tenancy was intended to run.

A petition for leave to appeal to the House of Lords has been granted by the House of Lords ([1961] 1 W.L.R. 209).

Green v. *Bowes Lyon* [1961] 1 W.L.R. 503: [1961] 1 All E.R. 13 (C.A.).

Landlord and Tenant Act, 1954—reversionary tenancy or agreement for future tenancy—effect of construction of tenancy—meaning of "landlord."—The Court of Appeal has affirmed the decision of Pearson J. in this case (noted at (1960) 24 *Conveyancer* 246) but on different grounds. A Mr. Rye, it will be remembered, who held a long lease of certain premises, had granted to a Mrs. Wells a sub-lease of the whole premises expiring on April 4, 1959. Mrs. Wells granted a sub-lease of the ground floor and basement to the plaintiff expiring on April 1, 1959: and the plaintiff granted a sub-lease of the ground floor only to the defendant expiring on March 31, 1959. And Mr. Rye also granted a lease (described as a "reversionary lease") of the ground floor to the defendant for seven years from April 5, 1959. But the sub-leases of both the plaintiff and the defendant, being "business" tenancies, were continued by section 24 of the Landlord and Tenant Act, 1954, beyond the date upon which they would have expired at common law. The Court of Appeal, though not dissenting from the view of Pearson J. that the "reversionary lease" granted by Mr. Rye was a "reversionary tenancy" within section 65 (3) of the Act as distinct from an "agreement for a future tenancy" within section 28, decided the appeal upon different grounds. The Act protects tenancies, not merely "holdings" as defined by section 23 (3), so that the whole common law tenancy of the plaintiff of both ground floor and basement was continued by section 24 (see *Cornish* v. *Brook Green Laundry* [1959] 1 Q.B. 394; [1959] 1 All E.R. 373). That being so, Mr. Rye could not be the landlord for the purposes of section 28 (see definition of "landlord" in section 44 (1) of the Act). Consequently the "reversionary lease" granted by Mr. Rye (whether a "reversionary tenancy" within section 65 (3) or not) could not be an "agreement for a future tenancy" within section 28, which would bring the sub-tenancy of the plaintiff to an end under that section.

Leave to appeal to the House of Lords was granted subject to certain conditions with regard to costs.

Weg Motors v. *Hales and others* [1960] 3 W.L.R. 964; [1960] 3 All E.R. 762 (Ch.D.)

Option to take further lease—lease for twenty-one years—option in separate written agreement made in consideration of lease—option for renewal of lease or for granting of new lease—validity of option—

whether running with the reversion—property subject to mortgage at time of lease and option—whether lessor had power to bind reversionary estate—Law of Property Act, 1925, *s.* 142.—In this case a number of different points of law arose out of a somewhat complicated set of facts, which must first be stated.

On July 26, 1938, G. R. Investments, Ltd. (1) granted to the plaintiffs a lease of certain property in London for a term of twenty-one years from December 25, 1938, determinable by the lessees at the end of the seventh or the fourteenth year, and (2) by a separate written agreement made on the same day in consideration of the lease of even date but " executed after these presents " gave the plaintiffs the option of taking a further lease for twenty-one years of the same premises at the same rent, such option to be exercisable by notice in writing at any time before December 25, 1959, *i.e.* before the term granted by the original lease expired. At the time when this lease and option were granted the premises were subject to a charge by way of legal mortgage, which provided that the statutory powers of leasing should not be exercisable by the mortgagors without the written consent of the mortgagees, but that this provision should not apply to lettings for any period up to twenty-one years: and this mortgage had been duly registered under the Land Registration Act, 1925, in July 1937. In October 1941 (after one intermediate transfer), Grove Hall Court, Ltd. were registered as proprietors of the land. On February 11, 1947, (1) Grove Hall Court, Ltd. transferred the land to the trustees of the Royal Liver Friendly Society, who (2) granted a lease of the land for a term of 150 years from February 11, 1947 to Grove Hall Court, Ltd.; and (3) by a deed of substituted security a mortgage by demise of the leasehold interest of Grove Hall Court, Ltd., was substituted for the mortgage of the freehold interest executed in 1937. Accordingly, on February 21, 1947, (1) the trustees of the Royal Liver Friendly Society, were registered as proprietors of the land; (2) Grove Hall Court, Ltd., were registered as proprietors with a good leasehold title; and (3) the entry on the charges register relating to the mortgage of July 1937 was cancelled. This transfer was subject to the lease to the plaintiffs and to their option, notice of which had been registered. In 1959 the plaintiffs, having asked the mortgagees whether they were agreeable to a grant of a new lease at the same rent in accordance with the option, and having received a reply to the effect that the mortgagees considered that their consent was not required, sought specific performance of the agreement containing the option against the holders of both the freehold and leasehold interests in the land.

The main questions which arose were (1) whether the option contained in the written agreement of July 1938 was valid, and (2) if so, whether the burden of the option ran with the reversionary estate in the land so as to bind assignees of the original lessors.

Upon the first point Danckwerts J. held that upon the true construction of the agreement the option was an option for the renewal of the lease, which, although it was stated to be exercisable at any time before December 25, 1959, could not have been intended to remain exercisable, if the lease were to be determined under the " break " clause or by forfeiture before that date; and that the option agreement and the lease must have been regarded by the parties as part of the

same transaction. The option agreement was not, therefore, a provision for the granting of a new lease which might have been implemented after an interval from the termination of the original lease, so that the rule against perpetuities (which does not apply to covenants for the renewal of leases) had not been infringed.

Nor did the option agreement infringe section 149 (3) of the Law of Property Act, 1925, which provides that a contract to create a term limited to take effect more than twenty-one years from the date of the instrument purporting to create it shall be void. This subsection only renders void contracts to create terms which, when created, will only take effect more than twenty-one years from the dates of the leases which create them (see *Re Strand and Savoy Properties, Ltd.* [1960] Ch. 582, noted at 24 *Conveyancer*, 327).

But did the burden of the option run with the land? Section 142 of the Law of Property Act, 1925, provides that "the obligation . . . of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and so far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease be annexed and incident to and shall go with that reversionary estate." But counsel for the defendants argued (1) that the option agreement was not a "covenant"; (2) that the obligation of that agreement did not have reference to the subject-matter of the lease; and (3) that the original lessor did not have power to bind the reversionary estate. On this part of the case Danckwerts J. held (1) that although the word "covenant" is often used to describe a contract under seal, it is not confined to that meaning in the law of landlord and tenant and (2) that a covenant for renewal of a lease has always been regarded as a covenant touching and concerning the land (or having "reference to the subject-matter of the lease") since the early eighteenth century. He also held that the original lessees had power to bind the reversionary estate. At the time when the option was created the fee simple vested in the original lessors was the only reversionary estate expectant on the term granted by the lease, since the mortgage was by legal charge and not by demise: and although the mortgagees had the same protection, powers and remedies as if their mortgage had been by demise (see Law of Property Act, 1925, s. 87) they still did not have a mortgage by demise. Further, even if the mortgagees' consent had been required to the granting of the new lease under the statutory powers, that consent upon the facts of the case might well have been given in 1959: and in any event a lease granted by a mortgagor is binding at common law on anyone other than a mortgagee or his successors in title, and the mortgagees in this case had expressly raised no objection.

The learned judge also rejected a contention by the defendants that the action was not properly constituted, since the original lessees, who had in fact ceased to exist, had not been made parties. He also held that the trustees of the Royal Liver Friendly Society, had not ceased to be reversioners, when the long lease was granted to Grove Hall Court, Ltd., in 1947.

Beesly v. *Hallwood Estates, Ltd.* [1961] 2 W.L.R. 36: [1961] 1 All E.R. 90 (C.A.)

Option to renew lease—failure to register option as estate contract —whether option binding on assignee of reversion—negotiations for new lease on faith of option—execution of new lease by assignee—effect of new lease—The Court of Appeal has held (affirming the decision of Buckley J. noted at (1960) 24 *Conveyancer* 328), that the sealing of the new lease in this case by the defendant company imported delivery of the lease and that the lease was binding on the defendants subject only to the execution and delivery by the plaintiff of a counterpart. When once a deed has been delivered as an escrow, it is not recallable, even though the condition upon which it is to become operative has not been performed, except possibly where the performance of the condition has been unreasonably delayed. In the present case, however, there had been no such delay.

In these circumstances the points raised in the plaintiff's cross-appeal, namely (1) that the option for a new lease should not have been held void against the defendants for lack of registration as an " estate contract " under the Land Charges Act, 1925, and (2) that a new contract ought to have been spelt out of the correspondence between the parties on the subject of a new lease, were not argued.

Fredco Estates Ltd. v. *Bryant* [1961] 1 W.L.R. 76: [1961] 1 All E.R. 34 (C.A.)

Rent Acts—notice of increase of rent—correct increase—incorrect particulars—old control house—new control notice—notice served by agents of landlords—validity of notice—sub-letting of one room—sharing of scullery for purposes of cooking—subsequent occupation of further rooms by sub-tenant—whether sub-tenancy surrendered—whether sub-tenancy a separate letting—Act of 1920 ss. 3 (2), 12 (2). Two main points arose out of the complex facts of this case. The first and principal point related to the validity of a notice of increase of rent served upon the contractual tenant in 1945. The second concerned the position of a sub-tenant to whom one room in the premises had been sub-let together with the right to share the use of the scullery for cooking purposes in 1935.

The validity of the notice of increase was challenged upon the grounds that (1) the particulars of the rates payable by the landlord in 1939 and 1945 had been incorrectly stated; (2) the notice was in the form prescribed for " new control " houses, whereas in fact the house was an " old control " house; and (3) the notice had been served by agents for the landlords, whereas it should have been served by the landlord personally. Upon the first point counsel for the defendants (relying on a dictum of Scrutton L.J. in *Bourne* v. *Litton* [1924] 2 K.B. 10 to the effect that the information contained in a notice of this kind must be correct down to the nearest penny) argued that errors of threepence and twopence in the statements of the rates payable by the landlord in 1939 and 1945 respectively were fatal to the validity of the notice, even though such errors were far too small to affect the amount of the weekly increase of rent passed on to the tenant. The Court of

Appeal held, however, that although section 3 (2) of the Act of 1920 must be strictly construed, a small and inadvertent error of this nature, which could have no consequence at all, cannot be regarded as being a "statement or representation which is false or misleading in any material respect" within the meaning of that subsection. Secondly, although a notice in the form prescribed for "new control" houses is not identical with that prescribed for "old control" houses, it is nevertheless "in a form substantially to the same effect" (see Act of 1920, s. 3 (2)). Thirdly, although it would have been better if the firm of chartered surveyors acting for the landlords had signed the notice expressly "as agents," it had been well known to the tenants for many years that the firm did in fact have authority to act on the landlord's behalf. In the result, therefore, the contractual tenancy of the original tenant had been validly determined in his lifetime, so that he was no more than a statutory tenant at the time of his death.

It followed from this that since the original tenant left a widow living with him at the time of his death, who succeeded to the statutory tenancy, his daughter (the second defendant), who took out letters of administration to her father's estate, could have no claim to a tenancy of the whole premises, either contractual or statutory. But in 1935 the original tenant had granted to his son-in-law (the first defendant) a sub-tenancy of one room together with the right to use the scullery for purposes of cooking jointly with the original tenant and his wife: and it was further argued in opposition to the landlords' claim for possession of the whole premises that this sub-tenancy was still subsisting.

Upon this second point the landlords contended (1) that the sub-tenancy had been surrendered when the defendants were allowed by the widow to occupy three further rooms after the original tenant's death, and (2) that in view of the sharing of the scullery, the sub-tenancy was not protected by the Acts. Both these contentions were rejected. There had been no express surrender of the sub-tenancy: and there was no evidence of any conduct of the parties inconsistent with the continuance of the sub-tenancy which would lead to a surrender of the sub-tenancy by operation of law. Nor was there any suggestion in the evidence that the scullery, which was shared, was used for any living purposes other than cooking, so that in the view of the Court of Appeal the sub-tenancy of the one room did amount to a letting of a separate part of the house (see *Cole* v. *Harris* [1945] K.B. 474. 485).

Leave to appeal to the House of Lords was refused.

Tickner and another v. *Hearn and another* [1960] 1 W.L.R. 1406: [1961] 1 All E.R. 65 (C.A.).

Rent Acts—statutory tenancy—occupation by tenant—prolonged absence of tenant due to mental illness—whether statutory tenancy continued.—The Rent Acts, as is well known, only protect a tenant who is in personal occupation of the premises. But a tenant does not cease to be in personal occupation of the premises merely because he or she is absent from them for a period. The question is one of fact and degree in each case.

In the present case (which was described by Upjohn L.J. as "difficult and borderline") a statutory tenant, whilst temporarily absent from the premises, suffered a mental breakdown and was admitted to a mental hospital in 1954. At the time of the hearing she was still in the mental hospital, although she was re-graded to voluntary status in November 1959, and could legally have left the hospital after that date on giving seventy-two hours notice. She also genuinely hoped to go home, when she was well enough; but there was medical evidence to the effect that in view of her age a return home was most unlikely. Upon these facts the Court of Appeal held unanimously that the tenant had not lost the protection of the Acts. Ormerod L.J. took the view that in cases of this nature there must be evidence of something more than a vague wish to return. There must be a "real hope coupled with the practicable possibility of its fulfilment within a reasonable time": and in the present case there was evidence upon which the county court judge could find that the possibility of a return home could not be completely ruled out. Wilmer and Upjohn L.JJ. both considered that although prolonged absence on the part of the tenant may, in the absence of any explanation by the tenant, lead to an inference that the tenant is no longer in possession or occupation of the premises, such prolonged absence is not in itself conclusive. In the view of Willmer L.J. "once the tenant's absence is explained by proof of facts which do not of themselves involve an actual intention on his part to abandon possession, the plaintiff landlord . . . must prove affirmatively that the tenant has abandoned possession." Upjohn L.J., however, did not think that abandonment of possession is the relevant test. In his view "where absence is more prolonged than is to be explained by holiday or ordinary business reasons and is unintermittent, the onus lies on the tenant of establishing an intention to return, if he seeks the protection of the Acts." But even then an intention to return will not be sufficient, if that intention seems unlikely to be achieved within a reasonable time.

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6. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*: Where a case is not reported in any of the general series of law reports it is cited from *Taxation Reports* (T.R.)).

Crossland v. *Hawkins* [1960] T.R. 297 (Ch.D.)

Income Tax—Settlement—Arrangement

Statutory Provisions: Income Tax Act, 1952, ss. 397 and 403.

Point: By Income Tax Act, 1952, s. 403, there are defined for the purposes of Chapter II (*i.e.*, *ss.* 397–403) of Part XVIII of that Act the words "settlement" and "settlor." "Settlement" by this definition includes *inter alia* an "arrangement." "Settlor" in relation to a settlement "includes any person by whom the settlement was made or entered into directly or indirectly and in particular . . . includes any person who has provided or undertaken to provide funds directly or

indirectly for the purpose of the settlement . . . ." In order that a series of transactions should amount to an arrangement and thus a settlement within this definition, there must be some connection between the transactions. Thus, if a person takes part in one of the transactions and the transactions are not of necessity connected and he does not take such part in the knowledge of all the series of transactions, there may be no arrangement and hence no settlement. Each case will, of course, depend upon its own facts and a connection between various transactions is a question of fact. Any scheme whereby assets are provided by one person and ultimately reach another may well be capable of forming an arrangement where the whole process from the beginning to the end is part of a concerted plan.

Facts and decision: A company was formed with a capital of £100 divided into 100 shares of £1 each, of which two were issued, one being held by the respondent's wife and an accountant jointly and the other by the said accountant. The respondent, a film actor, was not at any time a shareholder in the company, but he was a director thereof. In December 1954 the respondent entered into a contract to render services to the company in consideration of a fixed weekly emolument during such weeks as he worked. The company had the full use of the actor's services, subject only to his right to ensure that he was not asked to do work which would injure his reputation as an artist. In March 1955 the respondent's father-in-law made a settlement for the benefit of the respondent's children out of his own moneys and an appointment under that settlement was made of the settled fund for the three children of the respondent contingently on attaining the age of twenty-five years. The trustees then used the settled fund to subscribe for the ninety-eight unissued shares of the company which were allotted to the trustees. During the year 1956/57 the respondent acted in a film and the company received £25,000 for the respondent's services, paying him £900 for his twelve weeks' work. The company then declared and paid a dividend of £500 free of tax which the trustees allocated and paid for the benefit of the respondent's children. The respondent then on behalf of his children claimed a repayment of the tax suffered on such dividend, but the right to such repayment was contested by the Revenue on the grounds that the dividend income was income of the respondent, as he must be treated as a settlor of the settlement formed by the transactions set out above.

Held: That the whole scheme did not amount to a settlement and the respondent was not a settlor of any such settlement. The Commissioners found that the respondent was aware that steps were being taken to put into effect proposals of the accountant and solicitors, but he was not consulted with regard to them. The respondent was not present at any meeting when the matter of the settlement was discussed, or when the deed of settlement was made. In these circumstances, there was no necessary connection between the service agreement with the company and the settlement by the grandfather. Mr. Justice Danckwerts commented, however, (at [1960] T.R. p. 300) " I think that it is possible that if it had been proved that a scheme had been evolved by the respondent in consultation with his solicitor and accountant, so that the whole scheme involved the formation of the company, the entering into of the service agreement by the respondent

and the settlement of a sum of money which would involve eventually the purchase of the shares, it would be possible to say that there was an arrangement within the meaning of the definition contained in section 403."

Jenkinson v. *Freedland* [1960] T.R. 307 (Ch.D.)

Income Tax—Adventure in the nature of trade

Statutory provisions: Income Tax Act, 1918 s. 237 (now Income Tax Act, 1952 s. 526).

Point: A single transaction of purchase and sale may amount to an adventure in the nature of a trade, thus causing the profit made upon such sale to be a taxable receipt of the recipient under Case I of Schedule D. It is not essential that a trading organisation be set up, or that the goods be offered to the public in order that the adventure is in the nature of trade. If a purchase is made with the object of resale at a profit and with no other object, then it is difficult to avoid the conclusion that a trade is not being carried on, for if it is not a trade, what is its category supposed to be?

Facts and decision: The taxpayer had expert knowledge in respect of resinous compounds. He purchased two stills for £160, which at the time that he bought them were covered both inside and outside with a resinous substance which prevented the machinery of the stills from working. Using his expert knowledge, he succeeded in restoring the stills and putting them into working order. He then sold the stills to two companies, of one of which he was the controlling director and of the other of which he was the sole shareholder. The price paid to him was £3,750 in respect of each still. The General Commissioners found that there was a sale of the stills, but that the transaction was not an adventure in the nature of trade.

Held: By Mr. Justice Danckwerts, that there was only one reasonable conclusion which could be reached, that this was an adventure in the nature of trade. The absence of any advertisement or other steps showing a trading organisation was fully explained by the fact that his purchaser was at hand, namely his own companies. The taxpayer had purchased the stills solely for the purpose of the resale and no other purpose could be found.

Forestside Properties (Chingford) Ltd. v. *Pearce* [1960] T.R. 261 (Ch.D.)

Income Tax—Property dealing—Sale of leases

Statutory Provisions: Income Tax Act, 1952, s. 123, Case I of Schedule D.

Point: In determining whether a company is carrying on a trade or is acting as an investment holding company, the objects clause of the memorandum is of considerable importance. This is particularly so where the company is one of recent formation. Further, the history

of the company and of the shareholders' interests in the property of the company prior to formation of the company are relevant as background knowledge for the interpretation of events which happened during the company's life. What use the profits obtained on any sales are put to is of no relevance as to the character of the transactions of the company which produce the profits.

Facts and decision: The appellant company was incorporated in 1951, the main objects clause of the memorandum being "to purchase lands, houses, and other property . . . and to create, sell and dispose of freehold and leasehold ground rents . . . and generally to develop by way of sale, lease, exchange or otherwise lands, house property and any other property . . . ." The company was given by various of the subclauses power to manage lands, to carry on business as managers of flats and to hold any lands, buildings or easements. The two shareholders and directors were builders and the company purchased from them twenty-four leasehold maisonettes under requisition or subject to the Rents Acts. The directors resolved that the property should be held as investments. Four years later on the advice of estate agents, the company started to sell 999 year leases and during a period of two years 16 of the maisonettes were so sold. The money obtained on the sales was loaned to the shareholders free of interest. The company was assessed under Case I of Schedule D in repect of the profits made on such sales.

Held: By Mr. Justice Danckwerts, that such assessment was correct. The objects of the company clearly showed that the company was formed for the purpose of developing land and not as an investment holding company, despite the fact that it could hold investments. Although the resolution in 1951 to hold the property as investments was made bona fide, such merely amounted to a decision to suspend trading activity for some time. Such a decision did not prevent the company from resuming the trading activities which the company was formed to carry on.

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7. *MISCELLANEOUS*

Littlewoods Mail Order Stores v. *I. R. C.* [1961] 2 W.L.R. 25; [1961] 1 All E.R. 195.

Stamp duty—conveyance to subsidiary company—exchange. In this case there were two distinct points arising out of the same series of transactions. By section 42 of the Finance Act, 1930, it is provided that *ad valorem* conveyance duty shall not apply to conveyances of beneficial interests from one company to another when either beneficially owns at least 90 per cent. of the issued capital or either or both are beneficially owned to the same extent by a third company. This concession is cut down by section 50 of the Finance Act, 1938, which provides that it is not to apply where there is an arrangement whereunder either the consideration is provided by a third party, *i.e.*, someone other than an associated company, or the conveyance to the associated company is preceded by a conveyance by a third party. The short

point was whether a lease by a third party preceding an assignment to an associated company was a preceding conveyance. Danckwerts J. held that the word " conveyance " in section 50 was to be given a broad construction and the lease was a conveyance for this purpose, so that the concession did not apply.

As part of the same transaction the freehold was exchanged for a lease at a nominal rent which was reversionary to an underlet at a rent of over £40,000 per annum. The argument of the Revenue was that in substance the exchange was part of a sale and that in any event there could only be an exchange of like interests. Danckwerts J. distinguished a number of cases where the exchange was preceded by, and by way of implementation of, a contract of sale. Then there was no preceding contract of sale. It also held that, whatever may have been the position in the time of Blackstone, today there may be exchanges of different interests. Hence the exchange only attracted a 10s. stamp.

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Highway Law, including the Highway Act, 1959, annotated, by C. A. Cross, M.A., LL.B., of Gray's Inn, Barrister-at-Law, Town Clerk of the Borough of Prestwich, and J. F. Garner, LL.M., Solicitor of the Supreme Court, Town Clerk of the Borough of Andover. Sweet & Maxwell, Ltd. 1960. 505 pp. (£4 4s.)

The Highways Act, 1959, which came into force on January 1, 1960, is a major statute. It contains 313 sections and 26 Schedules, and, as the authors point out in their Preface, it brings together substantially all the statute law which relates to highways. To this they could legitimately have added that it brings together substantially all the law which had previously existed under such titles as trunk roads, special roads, cattle grids, building lines, improvement lines, making up of private streets, new street bylaws, the law relating to bridges, rights of way, restriction of ribbon development, and even a substantial portion of the National Parks and Access to the Countryside Act, 1949. It is significant that, in a work which totals 486 pages, no fewer than twenty-three have to be expended in getting from the heading of the Act to where section 1 actually begins.

In approaching this massive piece of legislation, the authors have very wisely concentrated largely on teaching the reader to find his way about. They have prepared a careful comparative table from which the expert, familiar with the old law, can trace just where the provisions to which he is accustomed can now be found, whilst, for the reader who may want to look back to the older provisions, they have been careful to include in every section a note showing separately the derivation of each sub-clause. Even more usefully, they have collected in their Introduction crisp summaries of how many and how varied methods exist of effecting particular objects, such, *e.g.*, as the stopping up and diversion of a highway. It will come as a surprise to many readers to know that there are thirteen different statutory methods of securing the latter. On the other hand, the authors usefully draw attention to the fact that there is now one uniform procedure for the acquisition of land for highway purposes in place of the varied methods laid down in section 154 of the Public Health Act, 1875, and five subsequent statutes.

The authors have been ruthless in what they have omitted. Classic cases, well known to students of highway law in the past, are missing from the table of cases. This has both advantages and disadvantages. On the one hand, it makes for much greater ease of reading and simplification for the ordinary reader. The sheer mass of authority extending over four centuries has made very much for confusion of an occasional researcher. On the other hand, the book may be rendered less useful when a really unusual problem has to be pursued; the principle will be there, but may some recorded application of it to unusual facts still lurk in the learning of the past? Had, however, the authors expanded the clear explanations given in their sixty-six pages of Introduction into a treatise which covered every past authority, it would have led to much greater length and possibly much greater obscurity. The general reader will be grateful for a treatise which gives him, in a simple and straightforward form, what he needs to know for all day-to-day purposes in a statute which can touch his clients' interests at many points and of the existence of which he cannot afford to be ignorant.

C. P.